U.S. Department of Justice

Civil Division, Torts Branch
Federal Tort Claims Act Staff

Gail K. Johnson
Supervisory Trial Counsel

P.O. Box 888
Benjamin Franklin Station
Washington, D.C. 20044

Telephone: (202) 616-4280
Facsimile: (202) 616-5200

May 22, 2023

The Honorable Leslie Abrams Gardner
United States District Court for the Middle District of Georgia
Chambers of Judge Leslie Abrams Gardner
201 West Broad Avenue
Albany, GA 31701

Re: Letter of Recommendation for Greta Chen

Dear Your Honor:

It is my professional and personal pleasure to write this letter of recommendation on behalf of Greta Chen. One of the best parts about recruiting volunteer law clerks for the Federal Tort Claims Act (FTCA) Section at the U.S. Department of Justice (Department) is discovering talented future lawyers like Greta. She thrives in an intellectually-challenging environment and produces top-notch legal work while maintaining a pleasant and professional approach. Greta is a standout among not only the pandemic-era law clerk classes but among the over 200 law clerks that I have recruited over nearly 20 years here at the Department. She will thrive and grow working with you and your staff for reasons that will become clear in this letter.

Greta is a second-year law student at New York University and she worked full-time in our Summer 2022 Law Clerk Program. Her classmates included two students from Yale, two from the University of Virginia, and one from Stanford. The class was uber-talented and Greta held her own with them. Greta often worked more than the expected 40 hours per work as she was assigned, along with a Yale clerk, to a high-profile case scheduled for trial. My colleague, Larry Eiser, a seasoned trial lawyer loved working with both and gave them increasingly challenging assignments over the course of the summer. Greta worked on four assignments for Larry during her nine-week stint.

To give you a sense of why Greta became invaluable to Larry, here is an excerpt of a conversation between the two of them

> **Greta**: Larry, Hope you had a good weekend and have sufficiently recovered from last week's deposition. I'm attaching a short memo re: application of the discretionary function exception to XXXXX, since he was the defendant I was most concerned about prosecutorial immunity not applying to (although I think the analysis could apply to all of our defendants).

> The district court seems to have rejected the discretionary function defense based on the first prong of SCOTUS's two-part test, finding that defendants do not have discretion to violate the Constitution. However, the Constitution does not specifically prohibit any of XXXXX actions, and plaintiffs should not be able to circumvent the defense by simply claiming a constitutional rights violation when there isn't one
> **Larry**: This is great stuff Greta! But help me out because my memory is turning to @#%& – did I ask for this?
>
> **Greta**: Haha[. N]ot expressly but we talked about it during our conversation about the immunity argument (about what arguments might apply to XXXXX), and I had some time to look into it and found it interesting!
>
> **Larry**: I thought that's what happened but didn't quite believe it. So you saw that the argument I asked you to research might not win, so you, on your own, researched and prepared a killer memo on the back-up argument? Impressive! You're good to have on a team.
>
> Since I have your attention, let me ask you a couple of follow-ups . . . . (emphasis in the original).

The conversation between Larry and Greta continued as he posed more questions to which she responded, based on her research and legal analysis. In the end, Larry wrote: "Gail: Greta gets my vote for FTCA Summer Law Clerk GOAT (Greatest of All Time). See below."

Larry's appreciation for Greta's work and ability to anticipate legal questions continued for the entire summer. In addition to the memorandum analyzing application of discretionary exception function to defendant in malicious prosecution case, she worked on three more assignments for Larry and the trial team. Specifically, she -

1. Researched to what extent absolute prosecutorial immunity applied to conduct of six defendants in malicious prosecution case arising out of healthcare fraud investigation. Reviewed prosecution team's timeline. Created chart and wrote memorandum applying case law to facts in light of Fourth Circuit opinion.

2. Reviewed Office of Professional Responsibility Report and attachments and consulted about implications of findings on plaintiff's claims.

3. Drafted *Daubert* motion to exclude testimony of pharmaceutical expert related to healthcare fraud case.

As to each, Larry raved. He reveled in his engagement with Greta and her co-clerk and playfully referred to them as "Team Brain." He even remarked, at their addition to the trial team: "Yaaay! Our defense just got much stronger." Larry often complimented Greta's work. When she turned in her

Daubert motion to exclude an expert's testimony, he said: "Thanks[,] Greta. Another outstanding job!" Additionally, before taking the deposition of the subject of Greta's motion, Larry emailed: "Hi[,] Greta, We probably don't need to take the deposition of XXXXXX (I expect your *Daubert* motion will exclude him) but my team wanted to take it out of abundance of caution."

In a team-wide email, Greta discussed her findings as to absolute prosecutorial immunity, and Larry stated: "Good stuff, Greta," and adopted her research and finding, after challenging her analysis in additional questions. Greta, confident in her work, held steady. As the summer ended, Larry emailed that he was "[h]aving fun thanks to . . . curious young people examining and enjoying the gladiatorial spectacle." Even after Greta returned to law school, he remained in touch and even shared the final version of a motion for summary where he highlighted: "[Y]ou'll notice much of your good work in there."

As is evident, Greta contributed substantially to United States' defense of this multi-million case. I enjoyed reading the emails between Larry, Greta, and the trial team. Increasingly, Larry depended on Greta's work and even included her in a contentious virtual deposition. Her assignments grew more complicated as she plumbed the depths of the presented issues and Larry appreciated her thoroughness and willingness to think outside of the box and construct novel approaches.

I would be remiss if I did not mention Greta's exceptional interpersonal skills. From the submission of her application, she was very professional, pleasant, considerate, and mannerly. Our interview lasted nearly two hours and we got along famously. Although our program is hybrid, Greta took advantage of coming into the office on her designated days and sometimes extra ones. Larry preferred meeting her and her co-clerk in person and he enjoyed their conversations. He even attended a lunch to establish a rapport with them and another law clerk. Greta "was all in" during her summer with us and she was a favorite among the entire class. When I asked for a document with all clerk birthdays, Greta created a poster featuring each clerk's picture, birthday, and even a graphic of each astrological sign to hang in the law clerk room to make sure that I would not forget them. I did not.

Greta has no sense of entitlement but instead is grateful for every opportunity big or small. Unlike many of her peers, she knows how to write and send a handwritten note of thanks, and occasional holiday card. While in town visiting during Christmas 2022, she made sure that we would meet during the season. It was a very sweet gesture which I appreciated greatly She continues to remain in touch and I enjoy hearing about her school and clinical work during the school year. Of note, she and her classmates have an ongoing chat where they exchange texts throughout the year. This kind of connectedness is rare and Greta relishes her relationships with each of her classmates.

Your Honor, I am a big fan of Greta. Having clerked for three years for a federal judge here in Washington, D.C., I understand the inner workings of chambers. Greta would become an invaluable, hard-working member of your staff. Her natural curiosity would compel her to take on each case or

/ /
/ /
/ /
/ /

project enthusiastically and thank you for the opportunity to tackle the factual and legal issues presented. I hope this letter provides insights as to why I recommend her highly. If you have any further questions or concerns, please do not hesitate. I will gladly continue the rave. I can be reached at gail.k.johnson@usdoj.gov or 301-509-2989 (personal cellphone).

Yours sincerely,

Gail K. Johnson
Supervisory Trial Counsel and Law Clerk Coordinator
Torts Branch, Civil Division

NYU | LAW

KENJI YOSHINO
Chief Justice Earl Warren Professor of Constitutional Law
Director of the Center for Diversity, Inclusion, and Belonging

School of Law
40 Washington Square South, 501
New York, New York 10012-1099

P: 212 998-6421
F: 212 995-3662

kenji.yoshino@nyu.edu

May 26, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

RE: Greta Chen, NYU Law '24

Dear Judge Gardner:

It is a great pleasure to recommend Greta Chen, a member of NYU School of Law's Class of 2024, for a clerkship in your chambers. Greta took my Constitutional Law class in the fall of 2022. She also served as my research assistant in the 2022-23 academic year. I therefore feel I know her well and am confident in giving her my strongest recommendation.

Students usually take a course with me before serving as my research assistant. In Greta's case the order was reversed. In 2022, NYU implemented a Clerkship Diversity Program that feeds high-potential students into research assistantships with professors. The goal of the program is to support students typically underrepresented in the clerkship process. Greta beat out a highly competitive field to land a research assistant position with me. I am deeply grateful to the program for bringing her into my orbit.

In her personal statement, Greta wrote: "As a queer, Asian-American woman from the Deep South, I am constantly reminded of the power that lies in granting access to spaces that were historically designed to exclude. . . . I am applying to NYU's Clerkship Diversity Program in part because I believe deeply in the importance of representation at the highest levels of the legal profession." She expressed her interest in working on LGBTQ rights, which is one of my fields of specialty.

For the past year, Greta has worked closely with me on a project on so-called "trans-first" jurisdictions. I began this project some years ago, but put it on hiatus to finish a book on a separate topic. It's no exaggeration to say that Greta revived the project through her keen intellect and boundless energy. She functioned at the level of a junior colleague to bring it to a new level of sophistication.

This piece looks at jurisdictions that protect trans-rights more than they do gay rights. Iran, for instance, has state-subsidized gender affirmation surgeries for transgender individuals alongside the death penalty for same-sex sexual conduct. My article argues that we do not see this combination of "pro-trans, anti-gay" positions in U.S. discourse. This is particularly notable because the other permutations are robustly represented—pro-LGBT, anti-LGBT, and "pro-gay, anti-trans" (as espoused by so-called trans-exclusionary radical feminists). The paper argues that the "pro-trans, anti-gay" position is missing because it can only exist in jurisdictions with deeply entrenched sex-stereotyping. It contends that in Iranian society, it is much less subversive for a trans individual to transition and then fade into society as a member of a different sex than it is for a gay individual to engage in a public display of affection with a person of the same sex. The paper concludes by looking at aspects of domestic jurisprudence that protect trans individuals only to the extent that they "code" as stereotypes of the post-transition gender. It argues that this form of protection is unduly limited and regressive, as it is a symptom of enduring sex stereotyping.

Greta was a crackerjack interlocutor on every dimension of the project. One of the challenging aspects of this piece was that it required work at many different levels—including the theoretical, comparative, and doctrinal ones. Greta shone in each of the dimensions. On the theory side, she pressed me hard on the issue of how I was defining "pro-trans" jurisdictions, noting that the countries I was examining did not protect trans people in any sense other than allowing them to transition. It was not only an important descriptive point, but also one that ended up advancing the central argument of the paper. On the comparative side, she vastly deepened my knowledge of the societies I was examining. My main case studies were Iran and Japan, and she was able to scour the scholarly literature to find sources that illuminated the different ways in which trans identities are understood in those jurisdictions. Finally, on the doctrinal aspect of the paper, she canvassed an enormous array of U.S. cases and coded them according to whether they protected trans individuals in a regressive or progressive way.

In all of this work, Greta excelled on two tracks. She is a big conceptual thinker. As the poet John Hollander once said, she is good at giving "her belief and her disbelief, each when the other not necessary." At the same time, she was extremely meticulous and detail-oriented. She is a superb line editor and she Bluebooks like nothing you have ever seen. Her ability to do both conceptual and detail-oriented work would make her, in my view, an invaluable clerk.

Greta is also a thoroughly admirable person. A few qualities bear particular note here. First, Greta is tenacious. Based on her stellar work for me, I know we were both disappointed in her grade in my Constitutional Law class (a B-plus). However, Greta never let her grade affect her confidence or passion for the field. If anything, she redoubled her energies in addressing the constitutional law aspects of my paper. Second, Greta is public-spirited. Many LGBTQ students I have mentored from jurisdictions inhospitable to their rights breathe a sigh of relief when they land in New York City and never leave again. Even though her immediate family has moved away from Alabama, Greta feels that she needs to return at some point to the South to "fight the good fight." I have come to see that she will always run toward an important fight rather than away from it, thinking less of herself than of the folks she might leave behind. Finally, Greta is generous. I noted in my Constitutional Law class that she was unusually quick to see the good in her peers. More broadly, I have seen her extend herself—both on my project and beyond—to seek to understand her ideological opponents. She says she developed this quality growing up as an outsider in the South. Yet I also view it simply as an individual virtue—her first instinct is to humanize rather than to demonize.

For all these reasons, I think Greta will be "one to watch" for years to come. I expect great things from her, and know she will exceed even my high expectations.

If I were you, I would not hesitate!

Sincerely,

Kenji Yoshino

Kenji Yoshino - kenji.yoshino@nyu.edu - 212-998-6421

GRETA CHEN

801 15th Street S, Apt 617, Arlington, VA 22202 • (205) 238-9352 • greta.chen@nyu.edu

WRITING SAMPLE

The attached writing sample is my final paper for the Racial Justice Colloquium course I took in spring 2022 with NYU Law Professors Deborah Archer and Vincent Southerland. The paper explores how law in the United States has defined race and racial classifications over time. It then examines how this shift might impact antidiscrimination law and affirmative action in the future. This paper has not been reviewed or edited by any third party, and it was written before the Supreme Court's decisions in the *Students for Fair Admissions* cases. For brevity, I have omitted Part II, which traces the shift from state-assigned race to self-identified race, and the Conclusion.

RACE UNDER LAW: DETERMINING RACIAL IDENTITY IN AN ERA OF SELF-IDENTIFICATION

INTRODUCTION

Race has historically been understood as innate, immutable, and unambiguous. Early on, both the federal and state governments in the United States constructed strict racial categories intended to preserve a system of white supremacy. Yet, even as courts carefully policed the boundaries of racial categories, they were often forced to redefine race in manners that would remain internally coherent and lend legitimacy to the existing status hierarchy. Over the course of the twentieth century, new cultural and legal norms led to the dismantling of state-assigned racial classifications, and race has increasingly been recognized as a social construct. Now, individuals are invited to self-identify their race in a variety of settings. In this Essay, I explore how the law has defined race and racial classifications over time before turning to the promises and limitations of racial self-identification. Part I begins by analyzing the use of racial classification in the contexts of slavery and citizenship. Part II describes the movement from state-assigned racial classification to personal identification. Finally, Part III considers the implications of self-identification on antidiscrimination law and affirmative action policies.

I. HISTORICAL APPROACHES TO RACE AND RACIAL CLASSIFICATION UNDER LAW

Racial classification has long been used for the specific purpose of maintaining a social, political, and economic hierarchy in which whites were at the top. Because race determined what rights or liberties a person would be afforded, "race could not be perceived as a fluid set of categories since doing so would threaten the existing status quo."[1] Consequently, "[i]nstitutions . . . sought to preserve and defend the boundaries that defined each racial

[1] NATALIE MASUOKA, MULTIRACIAL IDENTITY AND RACIAL POLITICS IN THE UNITED STATES 50 (2017).

category."[2] This Part analyzes state efforts to sort individuals into discrete racial groups, focusing on two main areas. Part I.A investigates the role of race and racial categorization in preserving American slavery. Part I.B examines how courts defined race and whiteness to deny certain groups U.S. citizenship.

A. Race and American Slavery

Throughout history, racial classification and reclassification have served as tools to maintain existing hierarchies within the United States. Perhaps most obviously, race was used as a shorthand for enslaved status.[3] Specifically, early American colonists relied on physical attributes to define race, as it provided an easy way to distinguish between who was free and who was enslaved.[4] Because society afforded race such significance, "[s]trict racial classification rules . . . were at the very core of maintaining the institution of slavery and the system of white dominance."[5] Over time, laws began separating enslaved Black people from white indentured servants, and slavery became permanent and heritable for Black people.[6]

Early codifications of distinct racial groups defined race through hypodescent (also known as the one-drop rule), which categorized individuals with any known African or Black ancestry as singularly Black.[7] Thus, people with mixed ancestry were assigned the status of the

[2] *Id.* at 6.
[3] *See* PETER H. WOOD, STRANGE NEW LAND 21–34 (2003) (describing how the status of enslaved people became institutionalized as a racial caste associated with African ancestry).
[4] *See, e.g.*, Luther Wright, Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 523–24, 523 n.65 (1995); ARIELA GROSS, WHAT BLOOD WON'T TELL 24 (2008) ("[A] person who appeared 'negro' would be presumed a slave, unless affirmative evidence could prove that she was free.").
[5] Wright, *supra* note 4, at 520–21.
[6] *See, e.g.*, PHILIP S. FONER, HISTORY OF BLACK AMERICANS 189–92 (1975) (explaining how the status of Black people shifted from indentured servant to slave).
[7] *Id.* at 524.

subordinate group.[8] However, individuals who appeared racially ambiguous threatened to disrupt this method of classification, challenging the "equation of slavery with blackness and freedom with whiteness."[9] Their mere existence underscored the importance of defining race, as any "mistake" in racial assignment would subvert a system rooted in the idea of innate racial differences.

This dilemma persisted beyond slavery. Before the Civil War, Black individuals faced more restrictions and disadvantages than their white counterparts, even separate from their enslaved status.[10] After the Civil War, race replaced enslaved status entirely as the dividing line for who was entitled to what rights.[11] Indeed, the outcomes of many trials in the nineteenth-century South turned on race, yet there was no consensus on how to determine a person's racial identity.[12] As was done during slavery, racial passing was often employed to access the rights and privileges that whiteness conferred while avoiding the discrimination that accompanied being Black.[13] Courts therefore struggled to slot racially ambiguous people as either white or non-white, undermining the certainty of state-imposed distinctions based on race. Where blood or ancestry did not offer a clear answer, judges and juries often allowed evidence to be presented on a person's reputation or performance to determine their race.[14] The color line was thus not as

[8] *See id.* ("By 1910, almost all southern states had adopted the 'one-drop rule.' Under the one drop rule, individuals with any African or black blood in their veins were black under the law.").
[9] GROSS, *supra* note 4, at 4; *see also* ALLYSON HOBBS, A CHOSEN EXILE 30 (2014) ("[P]assing was imbricated with strivings for freedom, but also with slave masters' anxieties about the threat that racial ambiguity posed to the slave regime.").
[10] Wright, *supra* note 4, at 531–32 (listing the "legal and social disabilit[ies] associated with race").
[11] *Id.* at 532–33 ("The racial distinctions inherent in the free and slave categories were no longer viable in a society in which all were free. This situation forced legislators and courts to fashion laws and theories that replaced the obsolete slave/free dichotomy with rules based solely on race.").
[12] *See generally* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998) (examining how the law defined racial identity and racial status through "trials of racial determination").
[13] *See generally* HOBBS, *supra* note 9 (tracing the history of racial passing in the United States).
[14] *See* Gross, *supra* note 12, at 132–37, 147–51, 156–76; *see also* GROSS, *supra* note 4, at 24–27, 70–72.

strict and obvious as one might think; rather, racial migration was frequently permitted.[15] By allowing individuals to litigate their whiteness and move between racial categories, courts were able to preserve existing hierarchies that might have otherwise collapsed.

B. Race and Citizenship

Race also dictated who was entitled to American citizenship. The Naturalization Act of 1790 limited eligibility for citizenship by naturalization to "free white persons,"[16] forcing courts to define the boundaries of whiteness in so-called racial prerequisite cases. Nearly a century later, the Naturalization Act of 1870 extended eligibility to "aliens of African nativity and to persons of African descent."[17] Racial exclusions to naturalization were not fully eliminated until the passage of the Immigration and Nationality Act of 1952.[18] People who did not fall neatly within or outside of the boundaries of "white" or "African descent" thus posed a problem for a system that depended on racial distinctions. From 1790 to 1952, there were at least fifty cases in which courts attempted to define who counted as white.[19]

With the exception of immigrants from the borderlands between Europe and Asia, the racial status of European immigrants was rarely litigated, as they were presumed to be white.[20] In contrast, courts firmly rejected the notion that Asians could be white, relying largely on the idea

---

[15] *See generally* Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600-1860*, 91 MINN. L. REV. 592 (2007) (explaining how the one-drop rule permitted racial migration without undermining white purity).
[16] Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103–04 (repealed 1795).
[17] Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256.
[18] *See* Immigration and Nationality Act, Pub. L. No. 82-414, ch. 477, § 311, 66 Stat. 163, 239 (1952) (codified as amended in 8 U.S.C. § 1422) ("The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married.").
[19] *See generally* IAN HANEY LÓPEZ, WHITE BY LAW (2d. ed. 2006) (analyzing the criteria used by courts to determine whiteness and, consequently, citizenship).
[20] GROSS, *supra* note 4, at 231. Yet even those groups whose whiteness was interrogated most—Syrians and Armenians—ultimately succeeded in proving themselves to be white. *See id.* at 231–36.

of "racial common sense."[21] Simply put, no average person on the street would recognize someone from East or South Asia as white.[22] The Supreme Court ultimately addressed the question of whiteness and naturalization in two key cases. In *Ozawa v. United States*, Takao Ozawa, a Japanese American, argued that whiteness was a matter of skin color, and because he was the same color—if not paler—as white Americans, he should be treated as white and granted citizenship.[23] In a unanimous opinion, the Court rejected this interpretation, stating that whiteness extended only to "the Caucasian race."[24] Three months later, in *United States v. Thind*, the Court would rewrite its definition of whiteness, finding that whiteness was "synonymous with the word 'Caucasian' only as that word is properly understood."[25] *Ozawa* and *Thind* not only "make particularly clear the connection between racial common sense and the performance of whiteness,"[26] but they also illustrate how race and racial classifications can be adapted and exploited to maintain the subordination of racial minorities. Importantly, these cases did not challenge the constitutionality of early naturalization laws themselves but were instead about trying to expand the definition of whiteness.

Yet, even as whiteness served as a condition for naturalization for many decades, there was one group of immigrants who did not need to litigate this issue to attain citizenship. Following the end of the Mexican-American War in 1848, the Treaty of Guadalupe Hidalgo stipulated that former Mexican citizens were to be given "all the rights of citizens of the United States."[27] Because naturalization at that time was restricted to white persons, "Mexicans'

[21] *Id.* at 236.
[22] *Id.*
[23] GARY Y. OKIHIRO, AMERICAN HISTORY UNBOUND 286 (2015).
[24] Ozawa v. United States, 260 U.S. 178, 197 (1922).
[25] 261 U.S. 204, 214–15 (1923). Bhagat Singh Thind, the plaintiff in *Thind*, was "a high-caste Hindu, of full Indian blood." *Id.* at 206.
[26] GROSS, *supra* note 4, at 241.
[27] Treaty of Peace, Friendship, Limits, and Settlement between the United States of America and the Republic of Mexico, Mex.-U.S., art. IX, Feb. 2, 1848, 9 Stat. 922.

collective naturalization in 1848 prompted a *legal* definition of Mexicans as 'white.'"[28] Nonetheless, although Mexicans were considered white by law, they were not always perceived as white, creating a conflict between what was true legally and what was accepted socially.[29]

The racial prerequisite cases of the late nineteenth to mid-twentieth centuries demonstrate the challenges judges faced in articulating clear and consistent rationales for the boundaries between white and non-white that they were creating. "The courts had to establish by law whether, for example, a petitioner's race was to be measured by skin color, facial features, national origin, language, culture, ancestry, the speculations of scientists, popular opinion, or some combination of these factors."[30] Precedents on definitions of whiteness often changed as courts attempted to legitimize racial categories while restricting who was eligible for citizenship and—consequently—rights, privileges, and political power.

II. THE SHIFT FROM CLASSIFICATION TO IDENTIFICATION

[Omitted for brevity]

III. LEGAL IMPLICATIONS OF SELF-IDENTIFIED RACE

When considering race, institutions today typically rely on an individual's self-identified race. For example, self-identification is required for the census, employment forms, higher education applications, and applications for certain economic benefits. However, race is also

[28] LAURA E. GOMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE 87 (2d ed. 2018); *see also* GROSS, *supra* note 4, at 253–54 (explaining how Mexican immigrants were held to be "white by treaty").
[29] The classification of Mexicans as "whites" had implications beyond the citizenship context. For example, a commonly contested issue in Mexican-American challenges to school segregation was whether Mexicans constituted a separate race. In the 1914 case *Maestas v. Shone*, Mexican-American plaintiffs argued that their children were racially distinct from whites. Ruben Donato, Gonzalo Guzmán & Jarrod Hanson, Francisco Maestas et al. v. George H. Shone et al.*: Mexican American Resistance to School Segregation in the Hispano Homeland, 1912–1914*, 16 J. LATINOS & EDUC. 3, 4, 9 (2017). Thus, segregating these students violated the Colorado Constitution's prohibition on distinguishing and classifying public school students based on race or color. *See id.* In response, the defendants claimed that Mexican Americans were white, meaning that if the district was segregating them, it could not be on the basis of race. *See id.* at 10.
[30] LÓPEZ, *supra* note 19, at 2.

used in less overt ways, most commonly to make assumptions about a particular person or group based on one's perceptions and preconceived beliefs. In this Part, I analyze the interaction between self-identified race and socially assigned race in two contexts. Part III.A focuses on racial discrimination claims, and Part III.B centers around race-based affirmative action.

A. Socially Assigned Race and the Limits of Self-Identification

Claims of racial discrimination often require evidence of discriminatory intent. Plaintiffs can only prevail on an equal protection claim if they show that the state-sponsored racial classification has both a disproportionate impact on a particular race and is motivated by invidious racial discrimination.[31] Similarly, Title VII of the Civil Rights Act of 1964 prohibits disparate treatment, i.e., intentional discrimination, by employers,[32] and the Fair Housing Act (FHA) does the same in the housing context.[33] The alleged discriminator's state of mind is therefore integral to resolving these disputes.

For individual claims of racial discrimination, inherent to the intent analysis is what race the defendant perceived the plaintiff to be. For example, if a Black employee alleges that her employer discriminated against her because she is Black, the underlying assumption is that the employer did indeed view her as Black. To take it a step further, both the Equal Protection Clause and federal antidiscrimination laws would impose liability even if the employee in this instance was not Black, but the employer believed her to be Black and discriminated against her

[31] Washington v. Davis, 426 U.S. 229, 239 (1976).
[32] 42 U.S.C. § 2000e-2(a).
[33] 42 U.S.C. §§ 3604–3606; *see also* U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, TITLE VIII COMPLAINT INTAKE, INVESTIGATION, AND CONCILIATION HANDBOOK (8024.1) 2-2 (2005) (explaining that the standards for proving a violation under Title VII "should be followed in interpreting the Fair Housing Act"). Although both Title VII and the FHA also impose disparate impact liability, *see, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (Title VII); Texas Dep't of Hous. & Cmty Affs v. Inclusive Communities Project, Inc., 576 U.S. 519 (2015) (FHA), in this Essay, I focus on cases of disparate treatment where individual plaintiffs' identities are more likely to be relevant.

as such.[34] What matters in these situations is the plaintiff's social race—the one "she is involuntarily assigned by third parties based on her perceived appearance or social practices."[35]

Beyond acknowledging that discrimination can occur based on a person's perceived race, little attention has been given to exploring how the law should evaluate racial discrimination claims where the plaintiff's self-identified race differs from their socially assigned race. Under current doctrine, the question is whether the plaintiff was treated differently because of race, not whether the plaintiff belonged to a specific racial group. Nonetheless, proving disparate treatment based on race often requires the plaintiff to declare a particular race—namely, the race that was discriminated against. I argue that, in these cases, courts should explicitly look to the individual's socially assigned race without demanding that the plaintiff assert or justify her true racial identity.[36] To illustrate, rather than claim, "I was treated differently because I *am* Black," a plaintiff might say, "I was treated differently because the defendant *perceived me* as Black."[37]

[34] In other words, discrimination may be actual or perceived. An employer can correctly identify an employee as Black and discriminate against her based on her race, or the employer may incorrectly assume that the employee is Black and discriminate against her based on that assumption.

[35] Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEORGETOWN L. J. 1501, 1508 (2014). Although most often made on the basis of phenotype, misclassifications can also result from judgments about a person's name, country of origin, or other stereotypes about particular racial groups.

[36] Currently, most federal and state antidiscrimination laws do not explicitly protect against perceived discrimination. *See* HUM. RTS. CAMPAIGN, DISCRIMINATION BASED ON PERCEIVED CHARACTERISTICS 9 (2018); *see also id.* at 2 ("[M]any district courts have ruled that federal nondiscrimination laws . . . do not prohibit misperception discrimination.").

[37] This approach is not new. The Americans with Disabilities Act (ADA) provides that an individual is regarded as disabled—and thus protected by the Act—if she is perceived as disabled, even if she does not actually have such an impairment. *See* 42 U.S.C. § 12102(3)(A); *see also* Harrison v. Soave Enterprises L.L.C., 826 F. App'x 517, 526 (6th Cir. 2020) (stating that a plaintiff need only show "perception" of impairment). The reasons behind protecting victims of misperception in the disability context also apply to instances of racial discrimination. If someone is perceived to be a certain race, they may suffer from stereotypes associated with that race regardless of whether they are a member of that racial group. *Cf.* Williams v. Philadelphia Hous. Auth. Police Dep't, 380 F.3d 751, 774 (3d Cir. 2004) ("[A]ccumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment." (quoting H.R. Rep. No. 101-485, pt. 3, at 453)). Prohibiting discrimination based on perception makes it easier for plaintiffs to recover for their harms, protects individuals who do not wish to disclose their race in certain situations, and generally discourages differential treatment.

Focusing on the mindset of the alleged discriminator instead of the plaintiff's identity respects individuals' privacy and autonomy interests in racial identification. In theory, a plaintiff need not even declare her race in order to prove discrimination.[38] Looking only to socially assigned race in resolving racial discrimination claims is also desirable to the extent that plaintiffs then have the freedom to identify in whatever way they wish, without fear that a mismatch between their self-identified race and their socially assigned race might prevent them from obtaining redress.[39] In fact, mismatches might be beneficial on a broader scale because they challenge society's stereotypes about race.[40] Notably, under the perceived race framework, white plaintiffs who are misclassified by the defendant as another race, and then discriminated against based on that misclassification, are still entitled to restitution. In these situations, the plaintiff is still being treated worse than she otherwise would have been for reasons that are prohibited by law. Such cases could also raise important discussions about the privileges of appearing white that persist today.[41]

Furthermore, while self-identification offers little protection from discriminatory treatment based on perceived race, it allows for the blurring of racial categories that makes antidiscrimination jurisprudence more hospitable to those who identify as multiracial. "[P]roof of discrimination generally requires individuals to show that they were treated worse due to their membership in some category as compared to people outside that category. . . . Because [multiracial people's] ascribed racial identity does not fit neatly into conventional categories,

[38] Of course, plaintiffs would still be free to self-identify to the court if they chose to.
[39] To be sure, mismatches between self-identified race and socially assigned race could make it more difficult for the plaintiff to prove discriminatory intent. For example, a court might use the mismatch as evidence that the defendant never perceived the plaintiff to be a member of the group that faced the alleged discrimination.
[40] I do not address allegations of reverse discrimination in this Essay except to note that, although antidiscrimination laws were originally enacted to prevent discrimination against minorities and other historically disadvantaged groups, courts have generally been receptive to reverse discrimination claims.
[41] *See, e.g.*, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1712 & nn.5–6 (describing the benefits of passing as white).

they cannot deploy those categories . . . to demonstrate . . . racist treatment."[42] Thus, an approach to antidiscrimination law that focuses on the defendant's state of mind, while also respecting the expansive, non-categorical nature of racial identity, is most in line with prohibiting discrimination on the basis of race.

One might argue that the perceived race framework discounts individuals' true racial identities because courts can decide discrimination claims without inquiring into the plaintiff's actual race. In a sense, the law is saying, "It doesn't matter what you are." There is value in being seen and affirmed by the legal system, and it is important not to discount the dignity harms that occur when the law erases a person's identity. However, we can also be reassured by the fact that in cases of perceived discrimination, the person being discriminated against is not losing any right to redress by having their self-identified race ignored or overlooked.[43] Similarly, while the notion of perceived race threatens to reduce race to phenotype or other physical traits or mannerisms, the meaning of race is derived from social norms and meanings, and the assumptions we make based on a person's appearance should be acknowledged as one of the ways in which we construct race.

B. The Future of Race-Based Affirmative Action

The potential impacts of self-identification are perhaps most visible in the Supreme Court's affirmative action jurisprudence.[44] When determining the permissibility of a race-conscious policy, the question is generally not whether there was discrimination based on race,

[42] Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469, 505 (2010).
[43] In an ideal world, courts would recognize the plaintiff's actual race even though its decision does not rest on self-identification.
[44] Just as the previous Section examined intentional discrimination rather than facially neutral practices, here, I specifically analyze race-conscious affirmative action policies because race-neutral alternatives do not deal with individual racial identity in the same capacity.

but rather whether the so-called discriminator's consideration of race was justified. In this Section, I focus on the use of affirmative action in the higher education admissions process, but the same arguments can be applied to any situation in which a policy, program, or procedure gives preferences to a particular minority group.

Race in the affirmative action context is primarily established through self-identification. Applicants, if they so choose, indicate their racial identity on their applications, and colleges and universities use that information to evaluate each applicant. While an applicant's socially assigned race might play a role in the process—for example, through interviews or other identifying components of the application—most schools defer to the applicant's own identification. Additionally, since its decision in *Regents of the University of California v. Bakke*,[45] the Court has increasingly narrowed the use of remedying past discrimination as a rationale for affirmative action.[46] Instead, the prevailing justification today is supporting student body diversity.[47] This justification has had the practical effect of reinforcing a "thin" conception of race by reducing racial identities to mere numbers. For example, colleges and universities rely on student enrollment data—and self-reported identity in particular—to measure demographic diversity.[48] Ultimately, the Court's emphasis on diversity, combined with the fact that schools

[45] 438 U.S. 265 (1978).
[46] *See generally* Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 311–24 (2017) (discussing the Court's repudiation of the remedial justification for affirmative action in favor of the diversity justification over time).
[47] *See id.* at 323–24 ("After the Court's decisions in cases including *Wygant*, *Croson*, and *Adarand* substantially tightened the requirements for showing a proper remedial justification for race-conscious affirmative action programs, the only realistic and viable way to sustain any affirmative action program was under a diversity rationale, such as the one put forth in *Bakke*.").
[48] *See, e.g.*, Office of Communications, *Class of 2026 Arrives on Campus; the First in Princeton's Four-Year Expansion of the Undergraduate Student Body*, PRINCETON UNIV. (Sept. 7, 2022, 4:02 PM), https://www.princeton.edu/news/2022/09/07/class-2026-arrives-campus-first-princetons-four-year-expansion-undergraduate#:~:text=This%20year's%20class%20has%20international,are%20the%20children%20of%20alumni (reporting racial and ethnic self-identification data); *First-Year Class Profile*, MIT ADMISSIONS, https://mitadmissions.org/apply/process/profile (Sept. 2022) (same); *Yale College Class of 2026 First-Year Class Profile*, YALE COLL. UNDERGRADUATE ADMISSIONS, https://admissions.yale.edu/sites/default/files/2026profileweb.pdf (last visited Apr. 30, 2023) (same); *Meet*

generally accept students self-identified race as true, encourages applicants to manipulate their identities to take advantage of diversity policies. Specifically, the diversity doctrine both incentivizes and facilitates "reverse passing," or "the process by which whites disavow their white identity and present themselves as per se nonwhite."[49]

For many people who choose to reverse-pass, it is reasonable to think that their self-identification is not genuine. Instead, they elect to identify as a person of color solely for the perceived benefits of doing so, particularly given that reverse passing in the higher education context requires little more than checking a box. There is thus a mismatch between the white applicant's actual self-identified race and the race they self-report. This deception is one reason why most people find the phenomenon of reverse passing reprehensible: It is simply a lie. Yet, there exists another possibility. What if the person who is allegedly reverse-passing truly identifies with the race that they are seeking to assume? Before state-sanctioned racial classifications were struck down, people of color were often forced to litigate their whiteness to achieve certain legal benefits.[50] Now, in the era of self-identification and affirmative action, there are strong arguments against allowing white people to claim another race merely through their own say-so. The question, then, is whether it is possible or even desirable to require applicants seeking to benefit from diversity policies to prove their race.

Carolina's Newest Class, UNC UNDERGRADUATE ADMISSIONS, https://admissions.unc.edu/explore/our-newest-class (last visited Apr. 30, 2023) (same); Texas *'25 Student Profile*, UNIV. OF TEX. AT AUSTIN OFF. OF ADMISSIONS, https://admissions.utexas.edu/explore/freshman-profile (Sept. 17, 2021) (same).

[49] Beydoun & Wilson, *supra* note 56, at 328. "The elimination of affirmative action as a corrective mechanism by the Court, and the ascent of the diversity justification, opened the door for 'box checking'—the phenomenon by which college applicants seek to gain advantages in the diversity-driven admissions system by selecting a racial or ethnic classification that they believe will enhance their prospect for admission." *Id.*

[50] *See supra* Part I.

The controversy surrounding Rachel Dolezal serves as a relevant example of the complexities of reverse passing.[51] For over a decade, Dolezal identified and presented as Black despite being born to white parents.[52] By all accounts, she gave a dedicated performance. Dolezal darkened her skin, adopted hairstyles traditionally associated with Black women, and served as president of the Spokane chapter of the National Association for the Advancement of Colored People (NAACP).[53] Even after her ancestry and background were exposed in 2015,[54] Dolezal firmly maintained her Black identity.[55]

Regardless of whether Dolezal's self-identification is genuine, someone like her would appear to fulfill the purposes of diversity. The diversity principle follows most naturally from the idea of race as "culture, community, and consciousness."[56] Taking Dolezal's identification with and commitment to Black culture at face value, she arguably contributes to schools' cultural and racial diversity. Moreover, even if diversity is defined through lived experience, Dolezal has presumably faced the same types of discrimination experienced by Black people to the extent that she was perceived as Black for many years. What Dolezal cannot claim is the history of

[51] The practice of changing one's racial identity has also been labeled as transracialism. However, the use of the term "transracial" in this way has garnered controversy, as it was historically used to describe the experiences of children raised by adoptive parents of a different racial background. *See* Beydoun & Wilson, *supra* note 56, at 348–49. For that reason, I continue to employ the term "reverse passing" in this Essay, regardless of whether the "passing" is permanent or occurs only in isolated instances.

[52] *See, e.g.*, Chris McGreal, *Rachel Dolezal: 'I Wasn't Identifying as Black to Upset People. I Was Being Me,'* THE GUARDIAN, (Dec. 13, 2015), https://www.theguardian.com/us-news/2015/dec/13/rachel-dolezal-i-wasnt-identifying-as-black-to-upset-people-i-was-being-me.

[53] *Id.*

[54] *See, e.g.*, Emily Shapiro, *Rachel Dolezal Is Asked About Father's Race in Interview with ABC's Spokane Affiliate*, ABC NEWS (June 12, 2015, 6:23 PM), https://abcnews.go.com/US/rachel-dolezal-asked-fathers-race-interview-abcs-spokane/story?id=31727573.

[55] *See, e.g.*, McGreal, *supra* note 62 ("If somebody asked me how I identify, I identify as black. Nothing about whiteness describes who I am."). For a comparison of racial and gender identities and their ability to be changed, see ROGERS BRUBAKER, TRANS (2016). I do not take a position on whether Dolezal's self-identification was genuine, nor do I comment on what circumstances, if any, someone like Dolezal could legitimately identify as Black. Instead, I return to the original dilemma of how institutions of higher education should determine who counts as "diverse" (or, in the context of this Essay, who counts as a racial minority), using Dolezal as an example to frame the discussion.

[56] Gotanda, *supra* note 34, at 56.

Blackness and its entailments and knock-on effects.[57] This missing piece illustrates the shortcomings of the diversity rationale, which fails to adequately account for the past. If affirmative action is intended to address racial subordination, the remedial rationale is the only justification that makes sense.[58]

And yet, the debate over the merits of each justification seems immaterial given that the Court will likely strike down the use of race-conscious affirmative action in the *Students for Fair Admissions* (SFFA) cases.[59] However, perhaps there is an upshot to the Court's rejection of the diversity rationale insofar as it suggests a recognition that race is more than checking a box. One could interpret the Court's decision limiting the use of affirmative action not as evidence that race has no meaning, but rather as evidence that race has a deeper meaning not sufficiently accounted for through the current admissions process. As discussed earlier, slotting individuals into discrete racial categories flattens and encloses race. Notably, the plaintiffs in the SFFA cases seemed open to the use of race in essays,[60] which would allow students to construct their own narratives and explain what their identity means to them rather than relying on racial stereotypes.

---

[57] Camille Gear Rich argues that Dolezal's claim of Blackness would not be any more valid if she could identify a Black ancestor. Camille Gear Rich, *Rachel Dolezal Has a Right To Be Black*, CNN (June 16, 2015, 8:06 AM), https://www.cnn.com/2015/06/15/opinions/rich-rachel-dolezal/index.html. Justice Alito made a similar point during the oral arguments for *Students for Fair Admissions v. University of North Carolina*, asking whether a student would be entitled to a "plus factor" based on race because "it's family lore that [they] have an ancestor who was an American Indian." Transcript of Oral Argument at 98–99, Students for Fair Admissions, Inc. v. Univ. of N.C., (2022) (No. 21-707). Whereas Rich contends that ancestry is not as important to racial identity as a person's lived experiences, Alito implies that ancestry is important to race, but his concerns about the genuineness of a student's claim to their history prevent him from fully endorsing either justification for affirmative action.

[58] The two rationales for affirmative action also raise the question of choice. Affirmative action was originally designed to provide remedies for people who could not control their race and thus their history; it was not intended to benefit those who chose to "transition" races. For a discussion of the one-way nature of reverse passing and how it reinforces white supremacy, see Beydoun & Wilson, *supra* note 56, at 350–52.

[59] Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 142 S. Ct. 895 (2022); Students for Fair Admissions, Inc. v. Univ. of N.C., 142 S. Ct. 886 (2022); *see also FP SCOTUS Predictions: Supreme Court Set to Scrap Affirmative Action Admissions in Education*, FISHER & PHILLIPS (Jan. 11, 2023), https://www.fisherphillips.com/news-insights/fp-scotus-predictions-supreme-court-set-to-scrap-affirmative-action-admissions-in-education.html; Mark J. Drozdowski*, Supreme Court Separates Harvard, UNC-Chapel Hill Affirmative Action Cases*, BESTCOLLEGES (Aug. 1, 2022), https://www.bestcolleges.com/news/analysis/supreme-court-separates-harvard-unc-affirmative-action-cases.

[60] Transcript of Oral Argument, *supra* note 67, at 23–24.

Of course, a world in which racial identity can only be addressed only through detailed explanation comes with separate problems. In a sense, the proposed "essay" solution lies opposite to the perceived-race framework in antidiscrimination claims. In the case of affirmative action, individuals would be required to "prove" their race or the relevance of their race to benefit from diversity policies. There is thus a tension between acknowledging, vindicating, and celebrating race and burdening the people that would benefit from this recognition. I do not offer a solution to this dilemma except to make two observations. First, for many students of color, race is so deeply intertwined with their racial identity and life experiences that discussing it is not a burden at all and might even serve as a mechanism for racial reclamation.[61] Second, there might come a day when society at large understands the substance behind race and racial categories such that checking a box conveys sufficient meaning without any extrinsic proof. Until then, racial identity will likely have to be accompanied by something more than self-identification.

CONCLUSION

[Omitted for brevity]

[61] *See, e.g.*, Brief of *Amici Curiae* 25 Harvard Student and Alumni Organizations in Support of Respondent President and Fellows of Harvard College at 29–30, Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 142 S. Ct. 895 (2022) (No. 20-1199) (describing how students used their application essays to explain their racial and cultural heritage).

Applicant Details

First Name	**Grant**
Middle Initial	**W**
Last Name	**Coffey**
Citizenship Status	**U. S. Citizen**
Email Address	**grant_coffey@txnb.uscourts.gov**
Address	**Address** Street **3812 47th Street** City **Lubbock** State/Territory **Texas** Zip **79413** Country **United States**
Contact Phone Number	**18063174408**

Applicant Education

BA/BS From	**Texas Tech University**
Date of BA/BS	**May 2019**
JD/LLB From	**Texas Tech University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=74408&yr=2011**
Date of JD/LLB	**May 14, 2022**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Texas Bank Lawyer** **Journal of Biosecurity, Biosafety & Biodefense**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Texas Tech University Board of Barristers Appellate Lawyers Association 2020 National Moot Court Competition**

Bar Admission

Admission(s) **Texas**

Prior Judicial Experience

Judicial Internships/ Externships **No**

Post-graduate Judicial Law Clerk **Yes**

Specialized Work Experience

Specialized Work Experience **Bankruptcy, Patent**

Recommenders

Beck, Brandon
brandon.beck@ttu.edu
5126579093

Beyer, Gerry
gerry.beyer@ttu.edu

Jones, Robert
judge_robert_jones@txnb.uscourts.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Grant Coffey
3205 42nd Street
Lubbock, Texas 79413
806.317.4408
grant_coffey@txnb.uscourts.gov

April 11, 2023

The Honorable Leslie Abrams Gardner
United States District Court
C.B. King United States Courthouse
201 West Broad Avenue, 3rd Floor
Albany, Georgia 31701

Dear Judge Gardner:

I seek a position as a law clerk for the two-year term beginning in September of 2024. Clerking in your chambers is particularly appealing to me because of your experience hearing a high-profile case on a state voting law.

Diversity is an important consideration for law clerk hiring. On its face, a white man from West Texas does not appear to be a diverse addition to any team. But I bring cultural awareness stemming from my experiences as a West Texan based on the people—from farm hands to foreign academics—I have met and worked with. My unique perspective was influenced by (1) my mother, a social worker, and my father, a nurse, (2) my partner who worked at a domestic violence shelter, (3) my experience in agriculture, and (4) the years I worked closely and successfully with people having different viewpoints.

Beyond my perspective, my ability to excel in the legal field is shown by my rank in the top 5% of Texas Tech University School of Law, which I achieved while receiving my M.S. in Biotechnology with a 4.0 GPA. Subsequently, I gained experience as the law clerk for the Honorable Robert L. Jones in the United States Bankruptcy Court for the Northern District of Texas. Beyond bankruptcy, I have experience with property, intellectual property, and antitrust law.

Shifting from my legal and academic qualifications to my personal qualities, I am adventurous and scholarly. Together these qualities create a love of learning. This love of learning has fostered itself in many of my hobbies—caring for bees, plants, corals, and dogs; reading; baking breads; hiking; and repairing cars. One reason I love the law, and clerking, is that I am always learning. This positive attitude and willingness to learn sets me apart and makes me fun to work with.

Above, I attribute my experiences in Lubbock, Texas to my unique outlook, and you might wonder why I am interested in leaving. After spending 26 years in Lubbock, it is time to move to the next chapter and Georgia would be an exciting place to begin.

Thank you for your time and consideration.

Respectfully,

Grant Coffey

Grant Coffey

3205 42nd Street
Lubbock, Texas 79413

806.317.4408
grant_coffey@txnb.uscourts.gov

LICENSE

Licensed by State Bar of Texas — November 2022

EDUCATION

Texas Tech University School of Law, Lubbock, Texas

Doctor of Jurisprudence/Master of Science in Biotechnology — May 2022

Rank 6 out of 126 – Law GPA 3.83, summa cum laude, Order of the Coif

Dual degree program – graduate GPA 4.0

Top Grade in Patent Law, Trademarks and Unfair Competition, Wills and Trusts, Criminal Law, and Texas Marital Property

Distinction award in Commercial Law, Business Entities, Introduction to Intellectual Property, Constitutional Law, and Legal Practice II

Selected for the ABA Judicial Clerkship Program

Tutor for Property Spring 2021, and Spring 2022; Teaching Assistant for Wills and Trusts

Journal of Biosecurity, Biosafety, & Biodefense Law, Associate Editor

Texas Bank Lawyer, Contributing Writer and Editorial Board Member

National Moot Court Team Brief Writer

Texas Tech University, Lubbock, Texas

Bachelor of Science in Plant and Soil Science – GPA 3.341, Dean's List — May 2019

EXPERIENCE

Law Clerk to the Honorable Robert L. Jones, Lubbock, Texas — August 2022 – August 2023

U.S. Bankruptcy Court, Northern District of Texas

Draft opinions and memoranda; conduct legal research; attend trials and hearings

Texas Office of the Attorney General, Summer Clerk, Austin, Texas — July 2021 – August 2021

Clerked with the antitrust division; assisted in complex litigation

Conducted legal research; drafted memoranda; and participated in document review (Everlaw)

Myers Bigel, Summer Associate, Raleigh, North Carolina — May 2021 – July 2021

Drafted responses to Patent and Trademark Office actions, claim amendments, and client correspondence

Office of Research Commercialization, Texas Tech University, Lubbock, Texas — May 2020 – May 2021

Assessed patentability, market practicality, and regulatory hurdles facing new technologies

Lubbock Impact—volunteer organization, Lubbock, Texas — Fall 2019 – Spring 2020

Tutored disadvantaged children, ages 6 through 15

Americot—cotton seed company, Lubbock, Texas — May 2019 – May 2021

Juggled law school with extracurricular work

BASF/Bayer—trait introgression greenhouse, Lubbock, Texas — October 2017 – May 2019

Maintained close communications with direct supervisors

ACTIVITIES AND INTERESTS

bee keeping, reading, gardening, powerlifting, backpacking/hiking, rafting, soccer, music

TEXAS TECH UNIVERSITY SCHOOL OF LAW

Grant William Coffey

Course Level: Law

Current Program
Doctor of Jurisprudence
Program : Law JD
College : School of Law
Campus : Lubbock TTU
Major : Law

Comments:
Rank 41 out of 145 as of 1/7/20
Rank 25 out of 138 as of 6/2/20
Rank 9 out of 131 as of 1/7/21
Rank 7 out of 133 as of 6/1/2021
Rank 7 out of 127 as of 01/04/2022
Final Rank 6 out of 126 as of 05/26/2022

Awarded Degree Doctor of Jurisprudence 14-MAY-2022
Primary Degree
Program : Law JD
College : School of Law
Campus : Lubbock TTU
Major : Law
Inst. Honors: Summa Cum Laude

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R

TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:

ENROLLED TTU Texas Tech University

BTEC 5301	Intro to Biotechnology	3.00 TZ	
BTEC 5322	Bioinformatics Methods	3.00 TZ	
CHEM 5330	Biochemistry I	3.00 TZ	
CHEM 5332	Biochemistry III	3.00 TZ	

Ehrs: 12.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00

INSTITUTION CREDIT:
********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R

Institution Information continued:

Fall 2019 Law

LAW	5306	Legal Practice I	3.00	B	9.00
LAW	5402	Contracts	4.00	B	12.00
LAW	5404	Torts	4.00	B	12.00
LAW	5405	Civil Procedure	4.00	A	16.00
LAW	6108	Intro. to the Study of Law	1.00	A	4.00

Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 53.00 GPA: 3.31

Spring 2020 Law

LAW	5307	Legal Practice II	3.00	A	12.00
LAW	5310	Criminal Law	3.00	A	12.00
LAW	5401	Constitutional Law	4.00	A	16.00
LAW	5403	Property	4.00	A	16.00

Ehrs: 14.00 GPA-Hrs: 14.00 QPts: 56.00 GPA: 4.00

Summer 2020 Law

LAW	6276	Products Liability	2.00	A	8.00
LAW	6357	Professional Responsibility	3.00	A	12.00

Ehrs: 5.00 GPA-Hrs: 5.00 QPts: 20.00 GPA: 4.00

Fall 2020 Law
Participated in The Journal of Biosecurity

LAW	6039	Intro to Intellectual Property	3.00	A	12.00
LAW	6319	Intro Emerging Technologies Lw	3.00	A	12.00
LAW	6339	Criminal Procedure	3.00	A	12.00
LAW	6434	Income Taxation	4.00	A	16.00

********** CONTINUED ON PAGE 2 **********

Grant Coffey
grant.coffey@ttu.edu

Page: 1

Unsecured * Unofficial

Janessa Walle
ASSISTANT DEAN OF ACADEMIC SERVICES AND REGISTRAR

OFFICE OF THE REGISTRAR - LUBBOCK, TEXAS 79409
3 digit course numbers changed to 4 digit numbers effective September 1983
Texas Technological College changed to Texas Tech University September 1, 1969
OFFICIAL CERTIFICATIONS BEAR REGISTRAR'S SIGNATURE WITH UNIVERSITY SEAL

TEXAS TECH UNIVERSITY SCHOOL OF LAW

Grant William Coffey

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
Ehrs: 13.00 GPA-Hrs: 13.00 QPts: 52.00 GPA: 4.00						
Spring 2021 Law						
Participated in the Texas Bank Lawyer Journal						
LAW	6034	Trademarks Unfair Competition	2.00	A	8.00	
LAW	6040	Law and Science Legal Research	2.00	A	8.00	
LAW	6415	Wills and Trusts	4.00	A	16.00	
LAW	6420	Commercial Law	4.00	A	16.00	
LAW	7101	Journal of Biosecurity	1.00	CR	0.00	
Ehrs: 13.00 GPA-Hrs: 12.00 QPts: 48.00 GPA: 4.00						
Summer 2021 Law						
LAW	6008	Texas Marital Property	2.00	A	8.00	
Ehrs: 2.00 GPA-Hrs: 2.00 QPts: 8.00 GPA: 4.00						
Fall 2021 Law						
LAW	6057	Vineyard and Winery Law	3.00	A	12.00	
LAW	6222	Law Practice Technology	2.00	A	8.00	
LAW	6249	Crimes in IP & Info. Law	2.00	B	6.00	
LAW	7101	Journal of Biosecurity	1.00	CR	0.00	
Ehrs: 8.00 GPA-Hrs: 7.00 QPts: 26.00 GPA: 3.71						

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
Spring 2022 Law						
LAW	6050	Patent Law	3.00	A	12.00	
LAW	6416	Evidence	4.00	A	16.00	
LAW	6435	Business Entities	4.00	A	16.00	
LAW	7005	Texas Bank Lawyer	1.00	CR	0.00	
LAW	7101	Journal of Biosecurity	1.00	CR	0.00	
Ehrs: 13.00 GPA-Hrs: 11.00 QPts: 44.00 GPA: 4.00						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	84.00	80.00	307.00	3.83
TOTAL TRANSFER	12.00	0.00	0.00	0.00
OVERALL	96.00	80.00	307.00	3.83

********** END OF TRANSCRIPT **********

Page: 2

Unsecured * Unofficial

Janessa Walla

ASSISTANT DEAN OF ACADEMIC SERVICES AND REGISTRAR

OFFICE OF THE REGISTRAR - LUBBOCK, TEXAS 79409

3 digit course numbers changed to 4 digit numbers effective September 1983
Texas Technological College changed to Texas Tech University September 1, 1969

OFFICIAL CERTIFICATIONS BEAR REGISTRAR'S SIGNATURE WITH UNIVERSITY SEAL

Brandon Beck
Texas Tech University
School of Law
3311 18th Street #302
Lubbock, TX 79409

November 15, 2022

Dear Judge,

My name is Brandon Beck, I am an Assistant Professor at Texas Tech University School of Law and, formerly, an appellate attorney with the Federal Public Defender's Office, Northern District of Texas. I write this letter to wholeheartedly recommend Grant Coffey for a judicial clerkship position.

Grant was a student in my first-year Legal Practice course, which spans two semesters. Because there are only sixteen students in the class, I am able to get to know the students' personalities and abilities perhaps more than some of the other professors. Among a field of fine students, Grant stood out.

Grant is highly engaged. He was attentive and asked good questions that reflected a genuine curiosity about both the law and the practice of law. Grant is also smart and capable. He did well and did so consistently. The assignments I create for the students require a thoughtful approach to complex legal issues, both civil and criminal. He was able to handle these assignments with ease. I was impressed with his writing from the start and I watched his continued improvement throughout the year with great satisfaction. He was one of my top students, particularly when it came to legal research, writing, and overall demeanor. I only gave two As in the Spring semester and he earned one of them.

I ask a lot of my students and I require them to do good work. I've personally briefed over 200 federal appeals, I've argued more than a dozen cases before the Fifth Circuit, and in 2019, I briefed, argued, and won *United States v. Davis* before the United States Supreme Court. I know what it takes

to succeed as an attorney at a high level and I see that ability in Grant. I am certain he would be a valuable addition to your chambers.

If you have any questions or want additional feedback, please email me at brandon.beck@ttu.edu or call me at 512-657-9093.

Respectfully,

Brandon Beck

TEXAS TECH UNIVERSITY
School of Law

1802 Hartford
Lubbock, Texas 79409-0004
(806) 742-3791
FAX (806) 742-1629

Direct dial (806) 834-4270
Fax (978) 285-7941
E-mail gwb@professorbeyer.com
Website www.professorbeyer.com
Blog www.BeyerBlog.com

April 18, 2023

The Honorable Leslie Abrams Gardner
United States District Court Middle District of Georgia
201 West Broad Avenue
Albany, Georgia 31701

Re: Mr. Grant Coffey

Dear Judge Gardner:

I am privileged to enthusiastically and without reservation recommend Mr. Grant Coffey for a Judicial Clerkship with your court.

Mr. Coffey was a student in my Property and Wills & Trusts courses at the Texas Tech University School of Law. His performance was phenomenal; he is one of my most interested, motivated, and enthusiastic students. His examination performances have been incredible placing him in either first or second place in the class. He is currently ranked in the top 7% of his entire class.

When I was in search of tutor to work with my Property students, I interviewed Mr. Coffey and was very impressed. Accordingly, I hired him and never regretted it. His efforts were amazing. I was especially impressed with his eagerness to do a good job, his ability to take advice, and his punctuality in completing all tasks associated with the position. As a testament to his excellent work, I have already hired him to serve as a tutor for my Spring 2022 Property class.

Mr. Coffey has the characteristics needed to be a stellar clerk in your court. His analytical skills and his ability to express himself both orally and in writing are admirable. He has a proven track record in law school academically which is enhanced by his service on our *Journal of Biosecurity, Biosafety, & Biodefense Law* and the *Texas Bank Lawyer* on which he serves as a member of the Editorial Board. As further evidence of his research and writing skills, he obtained the coveted position as the brief writer for our National Moot Court team.

In addition to academic skills, I have observed that Mr. Coffey has the high ideals, principles, and integrity to be a valuable member of the legal community. I have absolutely no doubt that he would be a credit to your court. I urge you to give his application your most serious consideration.

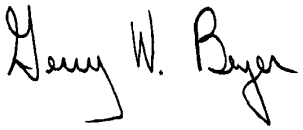
TEXAS TECH UNIVERSITY
School of Law

1802 Hartford
Lubbock, Texas 79409-0004
(806) 742-3791
FAX (806) 742-1629

Direct dial (806) 834-4270
Fax (978) 285-7941
E-mail gwb@professorbeyer.com
Website www.professorbeyer.com
Blog www.BeyerBlog.com

Please feel free to call or write if you desire any further information.

Sincerely,



Gerry W. Beyer
Governor Preston E. Smith Regents Professor of Law

United States Bankruptcy Court
Northern District of Texas
1205 Texas Avenue, Room 306
Lubbock, Texas 79401

Chambers of
Robert L. Jones
United States Bankruptcy Judge

Telephone
(806) 472-5020

November 15, 2022

Re: Application of Grant Coffey

Dear Judge,

I submit this letter in support of Grant Coffey's application for a clerkship with your court. Grant has served as my law clerk since August 2022. As a bankruptcy judge, I have one law clerk, and I have always employed term clerks.

My clerks work on everything I work on. Although Grant is still relatively early in his clerkship, he has prepared several extensive memorandums on a range of legal issues, both in small consumer bankruptcy cases and in large, complicated commercial civil actions. Grant has a fine legal mind: his analysis is sharp, he asks good questions, and he timely completes each project. I am able to incorporate much of his work product into opinions that I issue. And Grant enjoys the work. He has a genuine interest in the law and the task of legal analysis.

Grant is an excellent writer and editor. His writing style is simple, concise, and clear. He avoids legalese and attempts to sound like a lawyer (or like the opinions from cases he read in law school). His approach is mature and, in my opinion, beyond his age and experience. After I complete my final draft of any opinion, Grant does a final review and invariably provides helpful edits that improve the opinion.

Finally, Grant has fit-in seamlessly with court staff, both in chambers and in our clerk's office. In short, he is fun to have around. I unreservedly recommend Grant for a clerkship with your court.

If you have any specific questions about Grant or his qualifications for a clerkship with your court, please feel free to call me.

Sincerely,

Robert L. Jones
United States Bankruptcy Judge

Grant Coffey
3205 42nd Street
Lubbock, Texas 79413
806.317.4408
grant_coffey@txnb.uscourts.gov

Writing Sample:

The following is an excerpt from a memo that I drafted for Judge Robert L. Jones. The memo is the basis for an order addressing a creditor's objections to the bankruptcy trustee's summary judgment evidence.

The bankruptcy case stems from chapter 11 petitions filed by related businesses, collectively referred to as the debtors.

The objections arose from a contentious adversarial proceeding where the bankruptcy trustee sought to claw back transfers made by the debtors to the creditor. The creditor filed a motion for summary judgment. In response, the trustee cited several groups of evidence, one group comprised the debtors' excel spreadsheets. Some spreadsheets were used to fraudulently obtain funds through organizing and perpetrating a check kiting scheme orchestrated by the debtors CFO. The creditor alleged that the spreadsheets were inadmissible hearsay and not business records under Rule 803(6) of the Federal Rules of Evidence. The creditor further argued the spreadsheets were not properly sponsored and were used for fraudulent purposes; thus, the records are unreliable.

The memo, at this stage, was edited by myself and Judge Jones's judicial assistant. For this writing sample, the memo is structurally edited to emphasize only the excel spreadsheets and not the other hearsay objections raised by the creditor. Additionally, upon Judge Robert L. Jones's request, the party names have been changed to represent their relationship to the case instead of their identity.

A. Admissibility of the Evidence

The creditor alleges several pieces of the trustee's summary judgment evidence inadmissible hearsay.[1] Inadmissible evidence cannot be considered on a motion for summary judgment because inadmissible evidence "would not establish a genuine issue of material fact if offered at trial." *Renfroe v. Parker*, 974 F.3d 594, 598 (5th Cir. 2020) (quotation omitted). "[T]he summary judgment evidence need not be 'in a form that would be admissible at trial[.]'" *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986)).[2]

Hearsay is an out-of-court statement being offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). In general, evidence that is hearsay is not admissible unless the evidence falls within an exclusion or exception to the hearsay prohibition. Fed. R. Evid. 802. "Once a party has 'properly objected to [evidence] as inadmissible hearsay,' the burden shifts to the proponent of the evidence to show, 'by a preponderance of the evidence, that the evidence [falls] within an exclusion or exception to the hearsay rule and was therefore admissible." *Loomis v. Starkville Miss. Pub. Sch. Dist.*, 150 F. Supp. 3d 730, 742-43 (N.D. Miss. 2015) (internal citations omitted).

The creditor objects to the debtors' internal excel files.

i. Business Records Exception

The trustee argues that the debtors' excel sheets and employee emails fall within the business records exception to hearsay. Fed. R. Evid. 803(6). The creditor argues that the emails and excel sheets are not admissible because the trustee has not shown the creators had an

[1] The creditor objects to the debtors' CFO's testimony, the factual resumes of criminal proceedings against the debtors' employees, emails between the debtors' employees, and excel spreadsheets used in the debtors' fraud.
[2] For example, the court may consider testimony by affidavit that might not otherwise be admissible at trial. *Thomas v. Atmos Energy Corp.*, 223 F. App'x 369 (5th Cir. 2007).

obligation to create the documents and has not properly authenticated that the documents have been created for business purposes. To admit the documents as business records under Rule 803(6), the documents or records (i) must have been made at or near the time by someone with knowledge, (ii) kept in the ordinary course of business, (iii) made in a regular practice, and (iv) these elements must be shown by the testimony of the custodian or a qualified witness, then (v) the opponent may show the evidence lacks trustworthiness.

1. Excel Sheets

The creditor alleges that the excel sheets are not admissible under Rule 803(6) because they have unknown authors, no witness sponsored the documents, and were part of the debtors' fraud. Speaking to the authorship and sponsoring of the evidence, courts have found that a trustee can "establish [the business record] requirements through 'the testimony of the custodian or another qualified witness,' or by means of an out-of-court certification procedure established by rule or statute." *Curtis v. Perkins*, 781 F.3d 1262, 1267 (11th Cir. 2015) (citations omitted). Additionally, courts have held that the trustee's testimony is sufficient to authenticate the requirements of Rule 803(6) when the trustee's testimony is presented with enough circumstantial evidence to establish the trustworthiness of the documents. *Curtis*, 781 F.3d at 1268-69; *United States v. Flom*, 558 F.2d 1179, 1182 (5th Cir. 1977) ("the law is clear that under circumstances which demonstrate trustworthiness it is not necessary that the one who kept the record, or even had supervision over their preparation, testify"). Here, the trustee relies on the collection method, electronic records, interviews with employees, and a witness's deposition to conclude that the excel sheets were created and used in the ordinary course of debtors' business. ECF No. 288-1, Pl.'s Ex. B at App. 786; ECF 342-5, Pl.'s Ex. B at App. 1720.

Moreover, fraudulent activity does not preclude a business's records from being business records. *See United States v. Kaiser*, 609 F.3d 556, 575-76 & n.6 (2nd Cir. 2010). "The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." Fed. R. Evid. 803 advisory committee's note to Rule803(6).

Here, the debtors' employees routinely relied on the spreadsheets. An example is an exhibit[3] discussed in a witness's deposition—the exhibit is a spreadsheet documenting the debtors' check kiting. ECF No. 342-1 at App. 204, and 206:15-18. The witness describes the spreadsheet as "the daily intercompany spreadsheet, and it shows basically the amount coming from each dealership payable to which dealership it's payable to." *Id.* at App. 205. In the spreadsheet, the debtors' CFO directs the amount of money to deposit at each bank. *Id*. at App. 208. Employees then would deposit the requested amount in the specified bank account. The purpose of the documents was to perpetuate a check-kiting scheme, but the reliability of the documents is evidenced by the employee's reliance on the documents.

Ultimately, the Court should find that the excel sheets fall within the Rule 803(6) exception to hearsay because the debtors' employees relied upon the documents in the ordinary course of business and were appropriately sponsored by the trustee.

[3] ECF No. 337-9 at App. 2515-18 (Exhibit F-16).

Grant Coffey
3205 42nd Street
Lubbock, Texas 79413
806.317.4408
grant_coffey@txnb.uscourts.gov

Writing Sample:

I drafted this memo for Judge Robert L. Jones. The memo addresses two plaintiffs' "supplemental" objections to a debtor's claimed exemption from the bankruptcy estate.

As a preliminary review of bankruptcy, upon the filing of a bankruptcy petition, a bankruptcy estate is created. A debtor's property is included in the bankruptcy estate. The debtor may claim certain property as exempted from the bankruptcy estate. The property that can be exempted from the bankruptcy estate is governed by statute. After the debtor claims property is exempt, interested parties may object to the exemption.

In this bankruptcy case, the debtor had one main asset, a self-directed Roth IRA. The debtor claimed the IRA as exempt from the bankruptcy estate under 11 U.S.C. § 522(d)12.

The only significant debt owed by the debtor was a judgment owed to a married couple. The judgment creditors and the chapter 7 Trustee objected to the debtor's claim that the IRA was exempted from the bankruptcy estate.

Almost ten months later, the objecting parties filed, what they referred to as, a supplemental objection—the supplemental objection was more akin to an amended objection.

The debtor then filed a motion to strike the supplemental objection.

Both parties were confused on the procedure for filing an amended objection to exemption under the Federal Rules of Bankruptcy Procedure.

This memo was to address the parties' confusion and provide guidance to the Court on how to proceed.

At Judge Jones's request, the parties' names are altered to reflect their relationship to the case. The parties involved are (1) the debtor, (2) the chapter 7 Trustee, and (3) the creditors. The chapter 7 Trustee and the creditors are referred to collectively as the objecting parties.

MEMORANDUM

To: The Honorable Robert L. Jones, United States Bankruptcy Judge
From: Grant Coffey
Date: March 20, 2023
Re: Debtor Case No. X (Lubbock) – Supplemental objections, and a motion for leave to file supplemental objections

BACKGROUND

On February 3, 2021, the debtor filed his chapter 7 petition. In his petition, the debtor claimed a self-directed IRA as exempt from the bankruptcy estate under 11 U.S.C. § 522(d)(12).[1]

The IRA holds an interest in two trusts: Trust 1 and Trust 2. Case No. X ECF No. 73. [2]

The meeting of creditors was held on several dates[3] and concluded on June 9, 2021. ECF No. 27.

After several agreed motions to extend the time to file an objection to exemptions, the objecting parties filed their objection to exemptions on January 6, 2022.[4] ECF No. 73.

On October 3, 2022, the objecting parties filed a supplemental objection to exemptions. ECF No. 129. The debtor filed a motion to strike the supplemental objection to exemptions [ECF Nos. 137 & 139] prompting a response from the objecting parties [ECF Nos. 145 & 146]. One day prior to responding to the debtor's motion to strike, the objecting parties filed a motion for

[1] "Section" or "§" refers to 11 U.S.C., the Bankruptcy Code.
[2] "ECF No." refer to the entry number in case number X unless specified otherwise.
[3] The meeting of creditors was held and continued on:
March 26, 2021
April 30, 2021
May 3, 2021
May 28, 2021
[4] The motions to extend time were filed on:
June 18, 2021
July 1, 2021
August 16, 2021
September 14, 2021

leave to file a supplemental objection to exemptions [ECF No. 143], to which the debtor responded [ECF No. 147].

DISCUSSION

Regarding the supplemental objection, the leading issues stem from how objections to exemptions can be supplemented or amended.

The objecting parties argue that leave to amend is not required, rather as a contested matter under Federal Rule of Bankruptcy Procedure 9014, only a motion requesting relief is necessary.[5] And even if leave were necessary, the objecting parties contend that they are entitled to leave under Federal Rule of Civil Procedure 15.[6] ECF No.146.

The debtor argues the amended objection to his claimed exemption is barred by the time limitations in Bankruptcy Rule 4003(b) and leave is required under Bankruptcy Rule 7015. [7] ECF No. 139.

I. Procedure for amending objections to a claim of exemptions

First, the Court must address how amendments can be made to objections to exemptions. Bankruptcy Rule 4003(b), which governs objections to claimed of exemptions, is silent on the procedure of amending the objections. According to the objecting parties, no motion for leave is required because objecting to exemptions is a contested matter governed by Bankruptcy Rule 9014, and Bankruptcy Rule 9014 makes no mention of Bankruptcy Rule 7015. ECF No. 146 at 4. The objecting parties are silent on the issue of the deadline set by Bankruptcy Rule 4003(b). The deadline set by Bankruptcy Rule 4003(b) requires that objections to exemptions be filed "within

[5] "Bankruptcy Rule" refers to the Federal Rules of Bankruptcy Procedure unless otherwise stated.
[6] "Rule" refers to the Federal Rules of Civil Procedure unless otherwise stated. Rule 15 governs amended and supplemental pleadings.
[7] Bankruptcy Rule 7015 applies Rule 15 to adversarial proceedings. Here, the matter is in the main bankruptcy case as opposed to an adversarial proceeding.

30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later." Here, the amendment was brought well after the deadline expired.

The objecting parties are correct that Rule 15 is not applicable in contested matters under Bankruptcy Rule 9014. Bankruptcy Rule 9014 governs contested matters and specifies certain provisions of Part VII of the Bankruptcy Rules are applicable to contested matters. But no rule incorporated through Bankruptcy Rule 9014 governs amending pleadings in contested matters. *See* Bankruptcy Rule 9014(c).[8] Bankruptcy Rule 9014 does give courts discretion to apply other Bankruptcy Rules in Part VII, such as Bankruptcy Rule 7015 to contested matters. [9] Other courts have used Rule 15 as an avenue to permit amendments to objections to exemptions. *See In re Yeckel*, No. 05-39136, 2010 Bankr. LEXIS 4027 (Bankr. N.D. Tex. 2010); *In re Shumac*, 425 B.R. 139 (Bankr. M.D. Pa. 2010). The Court, at its discretion, may apply Bankruptcy Rule 7015 to contested matters pursuant to Bankruptcy Rule 9014, thereby allowing amendments to pleadings according to Rule 15. *See In re Yeckel,* 2010 Bankr. LEXIS 4027 at *7. If the Court decides to entertain the supplemental objections, the Court should apply Rule 15.

II. Applying Rule 15

Rule 15(a)(2) states "[t]he court should freely give leave when justice so requires." "In deciding whether to grant such leave, the court may consider such factors as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of

[8] Bankruptcy Rule 9014(c) applies Bankruptcy Rules 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071 to contested matters.

[9] "The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order." Bankruptcy Rule 9014(c). Here, if the Court applies Rule 15, little notice, if any is necessary, because both sides have fully briefed the factors discussed below to address Rule 15.

amendment." *Southmark Corp. v. Schulte Roth & Zabel (In re Southmark Corp.),* 88 F.3d 311, 314 (5th Cir. 1996).

A. Undue delay

The Supplemental Objection to Exemptions was filed on October 3, 2022, while the bankruptcy petition was filed on February 3, 2021. Nevertheless, the objecting parties are not delaying the process by filing the amended objection this late in the game. The debtor and the affiliated third-parties have not been forthcoming, thus the objecting parties were unable to provide many of the facts supporting the objection prior to recent discovery. Undue delay, therefore, is not a factor weighing against amending the Trustee's and Rutan parties' objection to exemptions.

B. Bad faith

The debtor argues the creditors are operating under bad faith.[10] To evidence the creditor's bad faith, the debtor cites a Georgia garnishment action,[11] a Georgia federal court suit,[12] and a Texas receivership action[13]—all initiated by the creditors. The evidence does indicate some bad faith in pursuing liabilities owed by the debtor to the creditors. But in any event, this evidence is only related to the creditor's bad faith not the chapter 7 Trustee's.

[10] The debtor's brief specifically states: "[the debtor] does not allege the Trustee is acting in bad faith, and presumes that the Trustee, his counsel, and the [creditors'] current counsel were unaware of the Georgia lawsuits discussed." ECF No. 139-1 at 5. But later, the debtor argues that a lack of candor shows the chapter 7 Trustee is operating in bad faith. *Id.* at 8.

[11] The creditors obtained a default judgment against Trust 1 that was later set aside because the creditors failed to properly serve Trust 1. Debtor Br. ECF No. 139-1 at 5-6. In connection with the Georgia garnishment action, the creditors also improperly tried to direct a person holding a note in favor of Trust 1 to make payments on that note to the creditors. Debtor App. ECF No. 139-2 at 145-170.

[12] The Georgia federal court suit was dismissed for failure to assert a recognizable cause of action. Debtor's App. ECF No. 139-2 at 32-46. The debtor also highlights discrepancies in the date of service on one of the parties—the creditors claimed to serve the party at his office on a day when the office was closed. Debtor Br. ECF No. 139-1 at 7.

[13] In the Texas receivership action filed by the creditors, the creditors counsel sent requests for admission to a non-party then took no further steps in the receivership action. Debtor's Br. ECF No. 139-1 at 7-8.

The debtor also claims both the chapter 7 Trustee and the creditors have operated with a lack of candor.[14] The alleged lack of candor is not sufficient to prevent amending the objection currently.

C. Failure to cure deficiencies

Failure to cure deficiencies by previous amendments does not apply in this case.

D. Undue prejudice

The debtor claims that the amendment would be unfairly prejudicial because "[t]he additional expense and delay are obvious from the multiple new facts and claims asserted by the [objecting parties]." Debtor's Br. ECF No. 139-1 at 8. Indeed, a party may be prejudiced when an amendment requires additional discovery for a new defense. *See Ford v. Pa. Higher Educ. Assistance Agency*, No. 3:18-cv-02782, 2019 U.S. Dist. LEXIS 125389 at *6-7 (N.D. Tex. 2019) (And "[w]here an amendment would cause considerable delay and expense for the opposing party, a court is more likely to find undue prejudice."). For the reasons that follow, no undue prejudice is created by the amendment.

Here, both the original and amended objections to the debtor's exemptions are related to the IRA claimed as exempt under § 522(d)(12). The original and amended objections are premised upon allegations that the IRA benefited from excess contributions and engaged in prohibited transactions, thus, the IRA is disqualified from exemption under § 522(d)(12).

The original objection alleges that contributions to the trusts that the debtor's IRA had an interest in are excess contributions to the IRA. ECF No. 73. The original objection claims that the IRA engaged in prohibited transactions when Trust 1 and Trust 2 paid the debtor's relatives,

[14] The debtor argues the objecting parties are misleading the Court by misrepresenting the testimony of Trust 1's trustee. Debtor Br. ECF No. 139-1 at 8. The objecting parties rely on a statement Trust 1 trustee made in her deposition on December 13, 2021, but she corrected the statement on February 3, 2022. Debtor App. ECF No. 139-2 at 171-72.

paid debts of trusts the debtor is trustee of, loaned money to the debtor, and borrowed from improper parties.

The amended objection adds more facts to the original underlying objection that the IRA cannot be exempt under § 522(d)(12) because the IRA benefited from excessive contributions and engaged in prohibited transactions. The amended objection to exemptions adds that the initial funding of the IRA was an excess contribution based on the debtor's reported income. ECF No. 129 at 7-8. Also related to excess contributions, the amended objection alleges outside sources provided excess contributions to the IRA by funding the trusts that the IRA owned an interest in. *Id.* at 6. The amended objection goes on to describe a rough outline of how the trusts acquired several properties, thus allegedly contributing to the IRA. ECF No. 129 at 7-20. Turning to the prohibited transaction argument, the amended objection alleges many additional prohibited transactions took place where the trusts, owned in part by the debtor's IRA, engaged in transactions with disqualified persons. ECF No. 129 at 21-29.

The facts and relationships surrounding the transactions are murky; however, the supplemental objection merely clarifies those facts and relationships. Regarding the debtor's concern for discovery, the debtor in this instance is the best equipped to obtain discovery—he has an equitable interest in these entities, accordingly, he is owed a duty from those entities. Thus, debtor will not be unduly prejudiced by the objecting parties amending their objection to exemptions.

E. Futility

Lastly, the Court must consider the futility of the amendment. The futility of the amendment to the objection circles back to Bankruptcy Rule 4003(b), which sets the deadline for objecting to exemptions. Here, this amendment missed the deadline. But there are exceptions for the rule when the objecting party timely files a motion for an extension. Bankruptcy Rule 4003(b)(2). Here, the objecting parties did not file a motion for an extension.

The only way the amendment would not be futile is if the amendment can relate back to the date of the timely filed original objection. Rule 15 states "[a]n amendment to a pleading relates back to the date of the original pleading when… the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading[.]"

In the amended objection, the objection to the exemption has remained the same—the parties object to the debtor's claim of exempting his IRA under § 522(d)(12). Moreover, the way the objecting parties attempt to prove that the IRA does not qualify as exempt property has remained the same—the objecting parties plan to show the IRA cannot be exempt because of excessive contributions and prohibited transactions. The amended objection does include additional facts to support the objection; those facts were discovered after the original objection and presumably would have been included in the original objection had those facts been timely discovered.

Ultimately, the amended objection concerns the same property, the IRA, and the same legal basis for objecting, excessive contributions and prohibited transactions. The amended objection relates back to the date of the original objection and, therefore, is not futile despite missing the deadline for objecting to exemptions under Bankruptcy Rule 4003(b).

CONCLUSION

Leave to file a supplemental objection to exemptions [ECF No. 143] should be granted and the motion to strike [ECF No. 139] should be denied. Using Rule 15 as the avenue to consider the permissibility of amendments, the Court should find that the amendment does not create undue delay, the movant is not acting in bad faith, the opposing party is not unduly prejudiced, and the amendment is not futile because it relates back to the timely objection.

Applicant Details

First Name	**Michelle**
Last Name	**David**
Citizenship Status	**U. S. Citizen**
Email Address	**madavid@uchicago.edu**
Address	**Address** Street **633 S Plymouth Ct** City **Chicago** State/Territory **Illinois** Zip **60605** Country **United States**
Contact Phone Number	**8475284100**

Applicant Education

BA/BS From	**Northwestern University**
Date of BA/BS	**June 2019**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Chicago Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Kim, Hajin
hajin@uchicago.edu
773-702-9494
Macey, Joshua
jmacey@uchicago.edu
Templeton, Mark
templeton@uchicago.edu
773-702-9494

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MICHELLE DAVID
633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

June 12, 2023

The Honorable Leslie Gardner
U.S. District Court for the Middle District of Georgia
C.B. King U.S. Courthouse
201 W. Broad Ave., 3rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I am a rising third-year law student at the University of Chicago Law School, and I am applying for a clerkship in your chambers for a two-year term beginning in 2024. As someone pursuing a public interest career in environmental law—particularly in the environmental justice space on behalf of low-income communities and communities of color—I would love to clerk for you given your long-term commitment to fighting for these same communities. Moreover, in terms of my priorities, I grew up in the Atlanta area and am hoping to return to my home state to begin building my career.

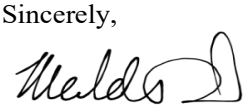
I am seeking a clerkship because I know it is one of the best ways to continue developing my analytical and writing skills while affording me the opportunity to learn from a wide range of attorneys on a variety of fast-paced issues. More than that, I also care deeply about community-building and mentorship, so I would look forward to working with a close-knit team.

I am confident that my writing and research abilities have prepared me to succeed as a clerk. Since beginning law school, for example, I drafted a 121-page initial brief with the Abrams Environmental Law Clinic to advocate for affordable and clean energy for low-income, BIPOC communities. More recently, I authored a forthcoming article in the *University of Chicago Law Review* on the toxic legacies of uranium mines and co-authored a separate forthcoming article in the *CUNY Law Review* on Asian American voting rights. Each project involved an area of law that was new but rewarding to learn, and these experiences have instilled in me a finer attention to precise language and style.

Additionally, I bring strong communication and collaboration skills. During my time as the team captain of my undergraduate Model UN team, I received multiple "Best Delegate" awards for my effective advocacy and collaboration. I further developed those skills following graduation, where I learned how to work closely with partners on matter pricing strategy as a Pricing & Legal Project Management Analyst. And, as a community leader with Asian Americans Advancing Justice | Chicago, I am proud that I mentored and led our volunteer team—including organizing planning and lobby meetings—to help pass a 2021 bill requiring Illinois public schools to integrate Asian American history into their curricula.

Beyond my background, I am a fast learner with a strong work ethic and know how to ask questions when necessary, and I would be grateful for the opportunity to work with you. I have included my resume, writing sample, and transcript for your review. Thank you for your time and consideration.

Sincerely,



Michelle David

MICHELLE DAVID

633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

EDUCATION

University of Chicago Law School — **Chicago, IL**
Juris Doctor — *Expected June 2024*
JOURNAL: Managing Editor, *University of Chicago Law Review*
COMMENT: *Clean Up Your Act: The U.S. Government's CERCLA Liability for Uranium Mines on the Navajo Nation* (forthcoming, *University of Chicago Law Review*)
ACTIVITIES: President, Environmental Law Society; Programming Director, APALSA

Northwestern University — **Evanston, IL**
Bachelor of Arts, cum laude, in Political Science, with minors in Environmental Policy & Economics *June 2019*
THESIS: *Empowerment & Silence at COP 21: An Ethnographic Analysis of Indigenous Activism*
AWARDS: McGovern Prize for Academic Excellence & Leadership, Environmental Policy Certificate of Honor (for environmental citizenship & service)
HONOR SOCIETIES: Phi Beta Kappa, Pi Sigma Alpha (political science)
ACTIVITIES: Chief of Staff, Model UN; President, Alpha Phi Omega (community service fraternity)

EXPERIENCE

Natural Resources Defense Council — **Chicago, IL**
Legal Intern, Litigation Team — *Expected Aug. 2023–Dec. 2023*

Arnold & Porter — **Chicago, IL**
Summer Associate — *May 2023–July 2023*

Federal Energy Regulatory Commission, Commissioner Allison Clements — **Washington, D.C. (Remote)**
Legal Intern — *Jan. 2023–May 2023*
- Researched environmental justice agency guidance, *Chevron*, and the APA for three gas pipeline orders
- Met with community-based groups, and provided feedback on panel questions for a justice-related event

University of Chicago Law School, Abrams Environmental Law Clinic — **Chicago, IL**
Clinic Intern, Michigan Energy Team — *June 2022–May 2023*
- Drafted the initial and reply briefs for energy justice clients in a rate case against an electric utility
- Collaborated with clients to draft testimony and discovery in an integrated resource planning case

Asian American Legal Defense and Education Fund — **New York, NY (Remote)**
Voting Rights Intern — *Sept. 2022–Dec. 2022*
- Conducted poll monitoring and exit polling during both the general and runoff elections in Georgia
- Drafted observation letters detailing violations of voting rights in counties with high AAPI populations
- Co-authored an article on threats to § 208 of the Voting Rights Act (forthcoming, *CUNY Law Review*)

Jenner & Block — **Chicago, IL**
Pricing & Legal Project Management Analyst — *Sept. 2019–Sept. 2021*
- Collaborated with partners to optimally price and approve alternative fee arrangements firm-wide
- Customized task-based budgets, fee analysis reports, and task list management tools for attorneys

Illinois Coalition for Immigrant and Refugee Rights — **Chicago, IL**
Policy Intern — *Jan. 2019–June 2019*
- Produced legal and policy research on immigration detention, enforcement, and state legislative efforts
- Created congressional fact sheets with immigration voting records, campaign finances, and census data

Chicago Council on Global Affairs — **Chicago, IL**
Global Water Intern, Global Food & Agriculture Program — *Sept. 2018–Dec. 2018*
- Drafted and edited sections of a law journal article on environmental migrants and refugee law
- Prepared memos on nutrient pollution, farmer-led irrigation, and water infrastructure for reports

INTERESTS

Community Organizing, Audiobook Memoirs, Sewing, Catan, NPR Podcasts

OFFICIAL ACADEMIC DOCUMENT

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://csl.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

- I **Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
- IP **Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation.
- NGR **No Grade Reported:** No final grade submitted
- P **Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
- Q **Query:** No final grade submitted (College only)
- R **Registered:** Registered to audit the course
- S **Satisfactory**
- U **Unsatisfactory**
- UW **Unofficial Withdrawal**
- W **Withdrawal:** Does not affect GPA calculation
- WP **Withdrawal Passing:** Does not affect GPA calculation
- WF **Withdrawal Failing:** Does not affect GPA calculation

Blank: If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

- H Honors Quality
- P* High Pass
- P Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website:
http://registrar.uchicago.edu.

Revised 09/2016

A PHOTOCOPY OF THIS DOCUMENT IS NOT OFFICIAL

THE UNIVERSITY OF CHICAGO

Name: Michelle Angela David
Student ID: 12334869

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

External Education

Northwestern University
Evanston, Illinois
Bachelor of Arts 2019

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Lior Strahilevitz	3	3	177
LAWS	30211	Civil Procedure Emily Buss	4	4	176
LAWS	30611	Torts Adam Chilton	4	4	177
LAWS	30711	Legal Research and Writing Alison Gocke	1	1	177

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Jonathan Masur	4	4	175
LAWS	30411	Property Aziz Huq	4	4	180
LAWS	30511	Contracts Douglas Baird	4	4	176
LAWS	30711	Legal Research and Writing Alison Gocke	1	1	177

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Alison Gocke	2	2	178
LAWS	30713	Transactional Lawyering Joan Neal	3	3	180
LAWS	43220	Critical Race Studies William Hubbard	3	3	177
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	182
LAWS	47201	Criminal Procedure I: The Investigative Process John Rappaport	3	3	177

Summer 2022

Honors/Awards
The University of Chicago Law Review, Staff Member 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	43228	Local Government Law Lee Fennell	3	3	177
LAWS	48215	Modern American Legal History William J Novak	3	0	
LAWS	90224	Abrams Environmental Law Clinic Mark Templeton	2	0	
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	43282	Energy Law Joshua C. Macey	3	3	181
LAWS	46101	Administrative Law David A Strauss	3	3	178
LAWS	53462	Tragedies and Takings: Selected Topics in Land Use and Resource Allocation Lee Fennell	3	0	
LAWS	90224	Abrams Environmental Law Clinic Mark Templeton	2	0	
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Aziz Huq	3	3	178
LAWS	46001	Environmental Law: Air, Water, and Animals Hajin Kim	3	3	179
LAWS	53404	The Role and Practice of the State Attorney General Michael Scodro Lisa Madigan	3	0	
LAWS	90224	Abrams Environmental Law Clinic Mark Templeton	1	0	
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P
Req Designation:		Meets Substantial Research Paper Requirement			

End of University of Chicago Law School

Date Issued: 06/12/2023

Hajin Kim
Assistant Professor of Law
University of Chicago Law School
1111 E 60th St.
Ph: 773.702.9494 | Email: hajin@uchicago.edu

June 13, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I am eager to recommend Michelle David as a clerk in your chambers. Michelle is the most competent research assistant I have ever worked with, and a delightful person to boot. Michelle's grades, while above-median, wildly understate her excellence.

I first got to know Michelle last summer when she applied to be a part-time research assistant (RA) for me. Michelle helped on multiple aspects of a project considering the influence of Environmental, Social, and Governance (ESG) metrics. She was fantastic, and I wish I could have hired her full-time. She supervised an undergraduate RA for me, and every week prepared a clear, actionable memo detailing what the two had completed, open questions (with all necessary context), and proposed next steps. Michelle got up to speed with a new dataset, downloaded the information we needed, and prepared an extensive literature review on the use of various ESG metrics in prior research. Her summaries were concise and research memos so well-organized and helpful that I now use her literature review memo as a model for other research assistants. And she did all of this work part-time, in a fraction of the hours I am used to seeing other RAs require for comparable work.

After the summer, Michelle asked me to supervise her comment. Michelle wrote about CERCLA liability for uranium mines on the Navajo Nation. I have nothing but admiration for both Michelle's process and ultimate work product. On process, Michelle proactively created deadlines for each paper milestone (outline, rough draft, final) and used that to create a schedule of feedback check-ins with me that she scheduled at the start of the quarter. The final paper is excellent and far better than any other comment I have yet supervised. Michelle clearly lays out the problem of unremediated uranium mines, taking the reader through a brief tour of military history along the way. She explains why prior attempts to compensate victims have failed and then proposes using CERCLA liability for the U.S. government to partially address the issue. Her legal analysis is crisp and clear—not an easy feat when discussing the intricacies of CERCLA. Michelle quickly gets to the hardest issues and references a wide range of relevant circuit and district court decisions in making her case. I was not at all surprised when the Law Review selected Michelle's comment for publication.

I also taught Michelle this past quarter in Environmental Law. Michelle was always prepared for class, came to office hours with insightful questions on how the law might apply in practice, and did a great job on the exam—her issue spotter answer was among the top scores.

I would be remiss if I wrote a letter about Michelle and did not mention her sterling personal qualities, though I hardly know where to begin. Michelle is professional and poised—mature beyond her years and self-reflective. She takes feedback well and runs with it. She's a joy to chat with and kind. Most of all, she is deeply committed to helping others and giving back. And it is because of her deep commitments outside of the classroom (she has done several internships and co-authored several papers, been on Law Review, worked close to 10 hours a week on the Environmental Law Clinic, served as the Environmental Law Society President, and volunteers on campaigns) that I feel her grades do not accurately portray her potential. Michelle uses so much of her time in service of others. When she allows herself to put her attention on one area—as she would with a clerkship—she is a total rockstar.

Finally, Michelle's success is especially impressive given her background. Her family's financial circumstances were always precarious, but right before Michelle began college, her mother lost her job. In college, Michelle always worked at least two part-time jobs, more than 20 hours a week, to send money home. She moved in with her grandmother to save rent, and so had a 1.5-hour commute with a half-hour walk each way to get to campus. Yet she speaks glowingly about her time in college—she is particularly passionate about building up Northwestern's Model UN team.

I would be delighted to speak more at length about Michelle's candidacy if at all helpful.

Sincerely,

Hajin Kim
Assistant Professor of Law

Joshua C. Macey
Assistant Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
jmacey@uchicago.edu | *773-702-9494*

June 13, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

It is my pleasure to write this letter of recommendation in support of Michelle David. I know Michelle well. I hired her as a research assistant in summer 2022, taught her in my Energy Law class, and supervised her Law Review Comment, which will be published in the coming months. Michelle is extremely intelligent, hard-working, and compassionate. She would make a terrific law clerk. I recommend her without reservation.

Michelle has all the usual characteristics of successful law clerks. Her grades are excellent. She is the managing editor of the Chicago Law Review. She has emerged as a leader in her class.

But one thing that does not come across from her resume or transcript is that Michelle is an absolute force of nature. This initially took me by surprise. She is humble and soft-spoken. She never brags about herself. But her will and her work ethic are beyond anything I've seen in a student. My colleague Hajin Kim and I asked Michelle to help us study unanticipated consequences of recent trends in corporate governance and corporate sustainability. We are particularly concerned that ESG campaigns are causing large publicly-traded firms to sell assets to private companies with worse environmental records.

Michelle did an amazing job. She had no experience with corporate law. The research tasks were unpleasant and complex. She had to track down databases and convince regulators to share data they were not required to share under open records laws. Over the course of the summer, Michelle tracked down and compiled all the information we needed. I had submitted open records requests the previous year to get this information. They were universally denied. Michelle was ruthless in pestering with regulators, directing them to the proper legal authority when they denied her requests, and tracking down all the information Hajin and I needed—often before we ourselves knew the information was available or useful

Since last summer, I've gotten to know Michelle well both personally and intellectually. All our interactions have confirmed my initial view that Michelle is an brilliant woman who will have an impressive and meaningful legal career. Michelle wrote one of the strongest exams in my forty-three-person Energy Law class. Michelle's Law Review Comment (Chicago's version of Law Review Notes) considers the application of Comprehensive Environmental Response, Compensation, and Liability ACT (CERCLA) to orphaned uranium mines. Michelle's Comment makes novel doctrinal point; she conducted significant original research in tabulating the orphaned uranium mines in the United States; and she avoided the primary sin of most law review comments, which is to let her normative priors color her views about the right legal question.

I should also say a few things about Michelle's background. Michelle was born in the Chicago and moved to Atlanta when she was nine. Unlike many top law students, Michelle does not come from privilege. She was raised almost entirely by her mother, who is a Thai immigrant and who worked as a server at Thai restaurants and a barista at Starbucks. Because her family was always financially stressed, Michelle was not allowed to play youth sports or participate in many other extracurricular activities. To study music, she had to find funding to support her. When her mother lost her job the year she started college, her family went on food stamps and welfare. As a result, during Michelle's first year of college, she ended up working twenty hours a week so that she could send money back to her family. She also moved in with her grandmother to save money on rent. Unfortunately, that required her to spent more than an hour commuting to and from classes.

I mention all this because it underscores how remarkable it is that Michelle has consistently reached enormous levels of professional and academic success. Despite the many demands on her time, Michelle has been a leader in every educational and professional environment in which she's found herself. She directs Chicago's Environmental Law Society. In that capacity, she organized a talk on "Environmental Racism in Chicago" with a community organizer from the Southeast Side who had worked on the Stop General Iron campaign. She set up a toxic tour that was led by the Black-led community-based organization People for Community Recovery of the area surrounding Altgeld Gardens. She also set up Chicago's first "Indigenous Environmental Justice" talk.

Some of the most interesting conversations I've had with Michelle involve the socioeconomic biases of law school. For example, Michelle has told me that she has felt excluded from many core law review experiences because she could not afford the $128 admission to Barrister's Ball or participate in the public interest auction.

As I hope is clear, I think the world of Michelle. She is highly intelligent, humble, and deeply committed to her family and to public service. She would be a terrific law clerk. Please do not hesitate to contact me if you have any further questions.

Sincerely yours,
Joshua C. Macey

Joshua Macey - jmacey@uchicago.edu

June 12, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Re: Clerkship Recommendation Letter for Michelle David

Dear Judge Gardner:

Michelle David is the top student out of more than 250 students I have worked with in my twelve years directing the Abrams Environmental Law Clinic and teaching at the University of Chicago Law School, and I give her my highest possible recommendation. In her first summer after law school, when she worked as a full-time law clinic intern, Michelle wrote approximately 100 pages—more than five-sixths—of an initial brief that we filed before the Michigan Public Service Commission (MPSC). Since then, she has ably contributed to her client's goals by performing multiple outstanding legal research projects, writing compelling direct and rebuttal testimony, and drafting critical portions of other briefs and filings. Michelle is exceptional—hard-working beyond belief, thoughtful and insightful, generous, warm-hearted, and deeply committed to her colleagues and clients. By example, she pushes me and her team to do our best work. I would hire her in a second if I could.

Throughout Michelle's time at the clinic, she has primarily worked on two cases before the MPSC: (1) a "rate case" in which a regulated electric utility—DTE Electric Co.—requested the Commission's permission to increase rates on customers, and (2) an "integrated resources plan" case in which the same utility submitted a long-term estimate of customer demands for electricity and a plan for the supply of generation resources the company would use to meet that demand. Through those cases, Michelle worked with our clinic team and our Detroit-based grassroots clients to fight for energy justice for all, especially for low-middle-income and Black, Indigenous, and People of Color (BIPOC) communities whom the energy system has historically harmed.

Michelle sought out this energy justice work in the first place after seeing firsthand how her family struggled to pay their bills growing up, including their utility bills. Michelle not only helped her mom pay these bills throughout college, but she also still helps her grandmother pay utility bills today. Additionally, because Michelle has volunteered as a community organizer on both local issue-based and electoral campaigns since 2020, I know she was excited to work directly with community-based organizations as a clinic student. These experiences have enabled Michelle to understand even better some of the challenges our clients face and to advocate on their behalf more effectively.

As I indicated in my opening paragraph, Michelle has drafted substantial amounts of written work filed by the clinic. As one example, Michelle was the primary drafter for an initial brief for the rate case. The initial brief represents one of the most comprehensive explanations of our client's positions, totaling approximately 120 pages and spanning eight core issue areas. She wrote that brief in less than seven weeks, starting with no knowledge of energy law in general, the relevant legal standards in Michigan, the history of prior proceedings, or the details of DTE's request—which spanned approximately 30 witnesses and 3,000 pages of submissions—or those of our clients and other intervenors—of similar scope as the DTE materials. She converted our clients' ambitious—arguably beyond scope—requests into clear, concise, and well-supported arguments. In that case, Michelle also took ownership over drafting another forty pages for the reply brief, exceptions (filed in response to the Administrative Law Judge's Proposal for Decision), and replies to exceptions. For her second case, the integrated resource plan case, Michelle worked with our team and expert witness to draft direct testimony, where she took primary responsibility over the sections advocating for our client's positions on energy efficiency, community solar, and distributed generation. Our expert witness founded our client due to community concerns about DTE's failures to include historically-disadvantaged communities in the energy transition, so I needed to have my most capable student—Michelle—drafting that portion of his direct testimony.

In addition to her excellent writing ability, Michelle researches new problems and solutions efficiently and thoroughly. For example, in preparing direct testimony on community solar and energy efficiency, Michelle found recent reports and research that supported our advocacy. Since I had worked on these issues for this client for almost seven years, it was easy for me to rely on what I knew and not look for new materials. Michelle convinced me that we could—and should—do better for our client and found additional resources that substantially improved the quality of the factual support for our positions. In that same case, in preparing for an upcoming initial brief, Michelle also prepared research on Michigan's integrated resource planning statute as well as current federal and state environmental laws. Again, this is an area in which I had assumed we would make the same arguments as we always make, but Michelle showed me through her research that we could sharpen our arguments and make them substantially stronger.

Michelle has shown that she works effectively alone as well as collaboratively in groups. For her initial brief assignment, she took ownership of the project, managing workflow from initial research to the final proofing and filing stages. While she can work independently when required, she also enjoys working on small teams. She voices her own opinions in both team-wide and internal-student meetings while also making space for others to participate and contribute. Michelle respectfully speaks up when she thinks the client, the team, and I are heading down the wrong path. She also enjoys the iterative process of swapping drafts with others, including helping to edit others' work and learning from others' feedback. I have seen firsthand how her comments and edits on a fellow student's draft have significantly improved her colleague's work.

Less glamorously but also critically, Michelle volunteers to take on new tasks when needed. For example, she organized the team's effort to sift through and summarize more than 800 pages of testimony supplied by one of our electric utilities in a new and

Mark Templeton - templeton@uchicago.edu - 773-702-9494

upcoming rate case. I have also appreciated that she often volunteers to take on projects that are needed but may be less captivating, such as creating discovery tracking spreadsheets, preparing slide decks summarizing our clinic's work, onboarding new members of the team, and uploading necessary discovery and testimony files to our shared folders. I rely on her heavily—as essentially a senior associate—to keep the team functioning smoothly and headed in the right direction. This was particularly important to me, her team, and her client this year because I was the clinic's sole supervisor for twenty students across five teams —my junior colleague having left at the beginning of the year to run Northwestern Law School's environmental colleagues—and because we were without a legal assistant for three months.

I cannot write Michelle strongly enough. She is extraordinary: the quality of her research, writing, client engagement, and commitment to her work, her team, and her client set a new high-water mark for the clinic. She will be a valuable asset to you and your chambers. Please do not hesitate to contact me at templeton@uchicago.edu or 773-702-6998 if I can assist further.

Respectfully,

Mark Templeton
Clinical Professor of Law
Director, Abrams Environmental Law Clinic

MICHELLE DAVID

633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

WRITING SAMPLE

I prepared a Comment on the U.S. government's liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) for unremediated uranium mines on the Navajo Nation. The attached writing sample is an excerpt from an early draft of that Comment and includes the Introduction, some of the factual background (Section I.A, Section I.B), and some of the legal analysis (Section II.B.2). For the purpose of this writing sample, I have also omitted or adjusted some content for length, but I have included below the abstract and full table of contents for context.

This draft reflects edits that are primarily my own, though I received general feedback during Fall 2022 on the overall substance and direction of the Comment. I am currently in the process of revising my Comment, but it has already been accepted for publication and is forthcoming in the *University of Chicago Law Review*. It follows the *Law Review*'s specific style guide.

ABSTRACT

This Comment delves into the Cold War legacy of uranium mining on the Navajo Nation. Today, unremediated hazardous waste from more than five hundred deserted mines has continued to poison the health and lands of the Navajo. This Comment argues that the federal government is ultimately liable for the remediation of these mines under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Specifically, because the federal government held legal title to the mining lands and tightly managed the mining operations, the federal government satisfies CERCLA's liability regime for "owners" and "operators." The U.S. government's liability under CERCLA warrants fuller attention by the U.S. Environmental Protection Agency (EPA), Congress, and states in order to achieve the complete, long-overdue remediation of these mines.

CONTENTS

MICHELLE DAVID
633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

Clean Up Your Act: The U.S. Government's CERCLA Liability for Uranium Mines on the Navajo Nation

INTRODUCTION

The Navajo Nation[1] is located across approximately twenty-seven thousand square miles of the U.S. Southwest at the corner of Arizona, New Mexico, and Utah.[2] It is home to nearly half of the Tribe's four hundred thousand enrolled members[3] as well as over five hundred deserted uranium mines.[4] Between World War II and the Cold War, these mines produced significant quantities of uranium ore under the U.S. government's direction in order to fuel the government's wartime nuclear ambitions. During this time, ore produced on Navajo lands totaled approximately thirty million tons[5] or approximately 14% of total U.S. uranium production.[6] Once uranium ore had been mined, mills refined the ore into concentrated "yellowcake," which was then further enriched into fuel suitable for nuclear power plants or the cores of nuclear weapons.[7] Today, the hazardous waste left from the mining has severely and detrimentally impacted the health of the Navajo Nation, having led to a wave of cancers, deaths, and lifelong health problems.[8]

The cleanup of these mines has been slow and insufficient. Under the Comprehensive Environmental Response, Compensation, and Liability Act[9] (CERCLA), the U.S. Environmental Protection Agency (EPA) has held a number of companies responsible for the cleanup costs of uranium mines,[10] which include the

---

1 Since 1968, "Navajo Nation" has been the official English name that the Navajo have adopted, and it is the name of the federally recognized tribe recognized by the U.S. government. *See Navajo History*, NAVAJO PEOPLE (Oct. 10, 2004), https://perma.cc/M5HE-LQQE. Before Spanish settlers introduced the term "Navajo," the Navajo traditionally referred to themselves as "Diné." TRACI B. VOYLES, WASTELANDING: LEGACIES OF URANIUM MINING IN NAVAJO COUNTRY, at xi (2015). Today, the Navajo use both "Diné" and "Navajo," *id.*, and this Comment will use "Navajo."

2 *History*, NAVAJO NATION (last updated Sept. 20, 2022), https://perma.cc/4FT3-ZT5S.

3 Simon Romero, *Navajo Nation Becomes Largest Tribe in U.S. After Pandemic Enrollment Surge*, N.Y. TIMES (May 21, 2021) https://www.nytimes.com/2021/05/21/us/navajo-cherokee-population.html (describing enrollment hikes from 306,268 in 2020 to 399,494 in 2021).

4 *The Health and Environmental Impacts of Uranium Contamination in the Navajo Nation: Hearing Before the Comm. on Oversight and Government Reform*, 110th Cong. 21 (2007); Kate Selig, *Can a New EPA Office Expedite Uranium Cleanup on Navajo Land? Not if Past Is Prologue.*, & THE W. (Nov. 2, 2020), https://perma.cc/BB6N-B773.

5 *Navajo Nation: Cleaning Up Abandoned Uranium Mines*, U.S. ENVTL. PROT. AGENCY (last updated Aug. 22, 2022), https://perma.cc/Y2AH-F3CJ (reflecting production levels from 1944–1986).

6 U.S. ENVTL. PROT. AGENCY, ABANDONED URANIUM MINES AND THE NAVAJO NATION: NAVAJO NATION AUM SCREENING ASSESSMENT REPORT AND ATLAS WITH GEOSPATIAL DATA, at vii (2007).

7 Barbara Johnston, Susan Dawson & Gary Madsen, *Uranium Mining and Milling: Navajo Experiences in the American Southwest*, *in* INDIANS & ENERGY: EXPLOITATION AND OPPORTUNITY IN THE AMERICAN SOUTHWEST 112 (Sherry Smith & Brian Frehner eds., 2010).

8 Lauren Morales, *For the Navajo Nation, Uranium Mining's Deadly Legacy Lingers*, NPR (Apr. 10, 2016), https://perma.cc/K3JU-LRXQ.

9 Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 42 U.S.C.).

10 *See generally, e.g.*, *Case Summary: Cleanup Agreement Reached at Former Uranium Mine on Spokane Indian Reservation*, U.S. ENVTL. PROT. AGENCY (last updated Aug. 23, 2022), https://perma.cc/XTA9-PXXK (referring to a 2012 settlement); *Case Summary: $600 Million Settlement to Clean Up 94 Abandoned Uranium Mines on the Navajo Nation*, U.S. ENVTL. PROT. AGENCY (last updated July 25, 2022), https://perma.cc/J6BM-E24N; Consent Decree, United States v. Newmont Mining Corp., 2:05-cv-00020, Dkt. No. 553 (Jan. 17, 2012) (requiring defendant companies to finance the cleanup of a uranium mine, following an initial, appealed trial court finding of CERCLA liability).

MICHELLE DAVID
633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

cost to permanently "prevent or minimize the release of hazardous substances" from "caus[ing] substantial danger to present or future public health or welfare or the environment."[11] However, while the EPA has successfully obtained financing from companies for this kind of cleanup (or "remediation") at certain mines, the EPA has not obtained financing for hundreds of *other mines* where the companies involved have already gone out of business or otherwise cannot afford remediation. In these "orphaned" mines cases, generally no remediation has occurred.[12]

The remediation of hazardous uranium mines has life-and-death stakes. Almost all of the orphaned mines sit within one mile of a natural water source, and many sit within close proximity of Navajo homes—some even within two hundred feet.[13] Waste from the unremediated mines has contaminated Navajo drinking water and continues to spread through dust in the air.[14] Studies corroborate that those living near uranium mines face an increased risk of developing cancers, kidney diseases, respiratory diseases, tuberculosis, and other chronic diseases.[15] One recent study found that 26% of Navajo women possess uranium levels higher than those found in the "highest 5% of the U.S. population,"[16] and other studies have previously linked uranium contamination to birth defects and other unfavorable birth outcomes.[17] The ongoing and intergenerational legacies of these orphaned mines and the frustratingly slow pace of existing remediation efforts demand renewed attention and new solutions.

This Comment argues that, in the case of uranium mining, the federal government is itself liable for the contamination and, thus, remediation costs of orphaned uranium mines under CERCLA. Where hazardous substances from a site have contaminated an area, CERCLA holds any "owner" or "operator" of the site strictly liable and requires the liable party to fund all remediation efforts.[18] The federal government

---

11 42 U.S.C. § 9601(24) (defining technically this kind of permanent cleanup operation as a "remedy" or "remedial action").

12 Selig, *supra* note 4 ("No mines have been cleaned up to date.").

13 Mary F. Calvert, *Toxic Legacy of Uranium Mines on Navajo Nation Confronts Interior Nominee Deb Haaland*, PULITZER CTR. (Feb. 23, 2021), https://perma.cc/MA84-TZFY ("Experts estimate that . . . 85 percent of all Navajo homes are currently contaminated with uranium.").

14 Cheyanne M. Daniels, *The US Nuclear Weapons Program Left 'a Horrible Legacy' of Environmental Destruction and Death Across the Navajo Nation*, INSIDE CLIMATE NEWS (June 27, 2021), https://perma.cc/ZWG4-MRKP.

15 *See* Susan E. Dawson & Gary E. Madsen, *Uranium Mine Workers, Atomic Downwinders, and the Radiation Exposure Compensation Act (RECA): The Nuclear Legacy*, *in* HALF-LIVES & HALF-TRUTHS: CONFRONTING THE RADIOACTIVE LEGACIES OF THE COLD WAR 117, 122–23 (Barbara R. Johnston ed., 2007).

16 Mary Hudetz, *US Official: Research Finds Uranium in Navajo Women, Babies*, ASSOCIATED PRESS (Oct. 7, 2019), https://perma.cc/9ZVK-Y7AB.

17 Johnston et al., *supra* note 7, at 121.

18 42 U.S.C. § 9607(a).

MICHELLE DAVID
633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

was both an "owner" and "operator" of the uranium mines on Navajo lands. It not only held legal title to the Navajo lands where the mining took place, but it also extensively controlled the U.S. uranium market by directing uranium exploration efforts, determining uranium suppliers and production quotas, positioning itself legally as the sole buyer of uranium ore and enriched uranium, and manipulating mining contracts on Navajo lands to maximize production. As such, where no other solvent "owner" or "operator" can be identified for a particular mining site, the U.S. government should be held responsible for the cleanup costs.

This Comment proceeds in three parts. [Roadmap Omitted]

I. THE PROBLEM OF UNREMEDIATED URANIUM MINES

[Roadmap Omitted]

A. U.S. Uranium Mining Beginnings

[Background on the Creation of the Atomic Energy Commission (AEC) Omitted] By 1948, government-led exploration and procurement of uranium were in full swing.[19] For example, after first learning about some deposits of uranium ore on Navajo lands, the AEC mapped out a wide-scale exploration strategy and began encouraging companies to mine the large deposits on and near the reservation to support the war effort.[20] Navajos helped U.S. officials locate high-grade uranium deposits in exchange for promised jobs, discovery rewards, and economic prosperity.[21] Hopeful in the promise of this prosperity, several prominent Navajo leaders advocated for the expansion of uranium development, framing it as a new form of "Navajo nationalism" and as development on their own terms.[22] Fittingly, the twentieth-century uranium boom that swept across the Navajo Nation and elsewhere in the United States was termed "uranium fever."[23]

However, uranium mining was not all that it seemed to be. The federal government knew early on the health risks associated with radiation from the uranium mines, but it did not disclose those risks to miners

19 Doug Brugge & Rob Goble, *A Documentary History of Uranium Mining and the Navajo People*, *in* THE NAVAJO PEOPLE AND URANIUM MINING 25, 27 (Doug Brugge, Timothy Benally & Esther Yazzie-Lewis eds., 2006).

20 *See id.*

21 Johnston et al., *supra* note 7, at 111, 115–17.

22 ANDREW NEEDHAM, POWER LINES: PHOENIX AND THE MAKING OF THE MODERN SOUTHWEST 233–36 (2014). Other Navajo activists called for their own version of "Navajo nationalism" in which the Navajo Nation would break from the extractive and colonial nature of mining and other similar operations. *See id.* at 218.

23 Johnston et al., *supra* note 7, at 115 ("'[U]ranium fever' swept the United States . . . . Finding uranium, according to Gordon Dean, chairman of the AEC from 1950 to 1953, became a patriotic duty.").

MICHELLE DAVID
633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

or their families for many years.[24] As early as the 1930s, the U.S. Public Health Service (PHS), an agency under the Department of Health and Human Services tasked with protecting the public health, had no doubt of the hazards posed by uranium mining due to comprehensive studies of uranium in Czechoslovakia and Germany.[25] Moreover, the PHS conducted its own epidemiological studies on the impact of radiation on the health of Navajo uranium miners beginning in 1949.[26] By 1950, the initial PHS results revealed radon exposures in mines on the Navajo Nation up to 750 times the acceptable limits.[27] By January 1951, internal records revealed that both PHS and AEC staff believed "radon [in uranium mines] was present in levels that would cause cancer."[28] Despite the evidence discovered during this time and over the course of a decade-long study on the health risks from uranium mining,[29] the PHS and AEC struck a deal with the mining companies to not "divulge the potential health hazards to the workers" or "inform those who became ill that their illnesses were radiation related."[30] This decision was part of an unethical compromise,[31] and it denied many miners crucial information about their health risks until at least the 1960s.[32]

Why did the federal government accede to this demand by the mining companies? PHS leadership did not want to "rock the boat" when it came to mining,[33] and the AEC was unwilling to risk the domestic uranium supply to any degree.[34] The AEC, in particular, continued to deny and downplay the mounting

---

24 Brugge & Goble, *supra* note 19, at 33–34. [Background on Radiation and Uranium Omitted (citing PETER H. EICHSTAEDT, IF YOU POISON US: URANIUM AND NATIVE AMERICANS 47–49 (1994))]

25 EICHSTAEDT, *supra* note 24, at 56 (explaining that at least one of the uranium mines that was subject to these European studies was known as "Siebenschlenhen" or "death mine"); Brugge & Goble, *supra* note 19, at 26–27 ("In 1926, clinical evaluation defined the histopathology of the lung cancer in miners. By 1932, Germany and Czechoslovakia had designated cancer in these miners as a compensable occupational disease." (citations omitted)). In the United States, the Bureau of Labor Statistics had by 1929 also begun reporting radiation-related health risks for workers producing glow-in-the-dark watches and clocks. EICHSTAEDT, *supra* note 24 at 54–55 ("Grotesque . . . radiation poisoning had been documented in the early 1920s when factory workers in companies that produced luminescent dials began to lose their teeth, jaws, and finally their lives.").

26 EICHSTAEDT, *supra* note 24, at 51.

27 *Id.* at 52. In other instances, such as one mine on the Navajo Nation that was run by the Vanadium Corporation of America and whose miners were 95% Navajo, the readings of these mines in the worst cases exceeded the "allowable weekly doses [of radiation] in less than one day and were reaching total annual doses in just a week [by contemporary standards]." *Id.*

28 Doug Brugge & Rob Goble, *The History of Uranium Mining and the Navajo People*, 92 AM. J. PUB. HEALTH 1410, 1413 (2002) (describing the records of an internal meeting between the AEC and PHS on January 25, 1951).

29 Dawson & Madsen, *supra* note 15, at 122.

30 Johnston et al., *supra* note 7, at 120; EICHSTAEDT, *supra* note 24, at 65 (stating that miners with identified health problems were "only informed . . . *after* they had contracted a fatal disease" and with no notice that the problems could be radiation-related) (emphasis added).

31 Brugge & Goble, *supra* note 19, at 32 ("The centerpiece of the Nuremberg Code, promulgated in 1947 and widely publicized, was the provision of informed consent to persons enrolled in research studies. The PHS study clearly violated a central tenet of [that] standard of care.").

32 Dawson & Madsen, *supra* note 15, at 127.

33 Brugge & Goble, *supra* note 28, at 1413 (quoting Victor Archer, head of the PHS medical team).

34 VOYLES, *supra* note 1, at 112. President Harry Truman clarified the AEC's understood role in maximing production in his memoir: "The Joint Committee [on Atomic Energy, which oversaw the AEC,] was primarily concerned with atomic development[ ] . . . and [ ] was always pushing for more production." HARRY S. TRUMAN, MEMOIRS BY HARRY S. TRUMAN: VOLUME TWO: YEARS OF TRIAL AND HOPE 297 (1956).

MICHELLE DAVID
633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

evidence for several years in order to achieve its uranium supply goals. In 1953, the AEC's chairman wrote to the Senate Joint Committee on Atomic Energy: "[T]he exposure accumulated to date by the individual miners in the uranium mines has not been sufficiently great to have produced injuries."[35] In 1954, while the AEC began experimenting with ventilation to reduce the radiation-related health risks and released a report recommending ventilation standards, its report ultimately did not require companies to install ventilation nor did it take up any other recommendations advocated by the PHS.[36] Of course, companies largely ignored these recommendations.[37] As the AEC's actions indicate, the agency was in the business of pursuing uranium development at all times and at any cost, including to health. [Paragraph Shorted for Length]

B. The Consequences and Broken Trust

[Background on U.S.–Navajo Trust Relationship Omitted] The Navajo only learned of the devastating consequences of the uranium once miners began to fall ill and die of cancers and other diseases in mass numbers.[38] Marie Harvey, the daughter of one Navajo uranium miner, recounted: [Block Quote Omitted] Marie's story is not uncommon. Professors Barbara Johnston, Susan Dawson, and Gary Madsen found that Navajo miners often "worked in dusty mine shafts, eating their lunch there, drinking water from sources inside the mine, and returning home to their families wearing dust-covered radioactive clothing."[39]

The hazardous waste produced by mining operations also contaminated the water supply and soil for the surrounding communities[40]—to say nothing of the fact that miners and their families frequently lived on-site in company-provided housing or lived nearby.[41] No one properly informed the Navajo about the dangers of kids playing on tall piles of the leftover ore ("tailings") or families building homes amid—and even at times with[42]—contaminated debris, further seeping uranium into all parts of Navajo life.[43] As a

35 EICHSTAEDT, *supra* note 24, at 69 (quoting Letter from Lewis L. Strauss, Chairman, Atomic Energy Comm'n, to W. Sterling Cole, Chairman, Joint Comm. on Atomic Energy (July 13, 1953)).
36 VOYLES, *supra* note 1, at 111 (explaining that the AEC did not oversee or enforce its ventilation recommendations).
37 EICHSTAEDT, *supra* note 24, at 71. [Note on Responsibility of Mining Companies Omitted]
38 Johnston et al., *supra* note 7, at 120–21.
39 *Id.* at 120.
40 *Id.* at 120–22; EICHSTAEDT, *supra* note 24, at 181–82.
41 Johnston et al., *supra* note 7, at 121–22, 124.
42 VOYLES, *supra* note 1, at 136–38 (explaining that companies used radioactive tailings as materials to build homes and other buildings).
43 Sherry Smith & Brian Frehner, *Introduction*, *in* INDIANS & ENERGY: EXPLOITATION AND OPPORTUNITY IN THE AMERICAN SOUTHWEST 1, 10 (Sherry Smith & Brian Frehner eds., 2010); VOYLES, *supra* note 1, at 139.

MICHELLE DAVID
633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

result, not only did the miners battle cancer and early deaths, but the families of miners also experienced birth defects, miscarriages, throat cancer, skin lesions and sores, and cleft palates.[44]

[Summary of Navajo Response (Protests, Community Programming, Other Relief) Omitted]

C. Prior Attempts to Compensate Victims and Remediate Mines [Omitted]

II. THE U.S. GOVERNMENT'S CERCLA LIABILITY

[Roadmap Omitted]

A. The Mechanics of CERCLA [Omitted]

B. The U.S. Government Is Liable for the Cleanup of Uranium Mines on Navajo Lands

[Roadmap Altered & Abbreviated] This Section argues that the U.S. government is liable under CERCLA for its involvement as an "operator" and "owner" of uranium sites on Navajo lands. [Text Omitted] As an initial matter, the definitions of owner and operator are not well defined by the statute. CERCLA does not define "owner" or "operator" in any instructive way—instead, it circularly defines each as a party that owns or operates a facility.[45] In response to this ambiguity, the courts have stepped in to design their own standards, often based upon the ordinary meaning of "owner" and "operator."[46] While some courts may disagree with one another in certain respects, courts universally agree that determining whether an actor is a PRP [Edit to Add: Potentially Responsible Party] is a fact-intensive inquiry that considers the totality of the circumstances.[47] This Section proceeds by first presenting the case for owner liability, the strongest case. It then presents the case for operator liability, the inquiry of which is highly fact intensive. [Text Omitted] The U.S. government is likely independently liable under both categories, given its strong property rights and extensive control of the uranium market. [Text Omitted]

1. Owner liability. [Omitted]
2. Operator liability.

a) Case law defining "operator" liability. Despite not directly owning a facility or incurring owner liability, an entity can still be held liable under CERCLA as an "operator." [Paragraph and Text Omitted

44 VOYLES, *supra* note 1, at 141–42; Johnston et al., *supra* note 7, at 121.

45 Kiersten Holms, Note, *This Land Is Your Land, This Land is Mined Land: Expanding Governmental Ownership Liability Under CERCLA*, 76 WASH. & LEE L. REV. 1013, 1026 (2019). The Supreme Court labeled them "useless[ ]." United States v. Bestfoods, 524 U.S. 51, 66 (1998).

46 *See, e.g.*, Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1498 (11th Cir. 1996) (turning to state law to define the ordinary meaning of "owner" and "operator").

47 *See, e.g.*, Tosco Corp. v. Koch Indus., Inc., 216 F.3d 886, 892 (10th Cir. 2000).

MICHELLE DAVID
633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

on *United States v. Bestfoods*[48]] "Operation" under CERCLA means "more than mere mechanical activation of pumps and valves, and must be read to contemplate 'operation' as including the exercise of direction over the facility's activities."[49] The Supreme Court in *Bestfoods* further specified: "[A]n operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."[50] Importantly, the *Bestfoods* court also clarified that the question of operator liability is an inquiry into the relationship between the entity in question and the facility itself.[51] A court can only hold an entity liable as an operator if the entity had a certain degree of direct control over the facility itself—beyond simply a relationship to a separate entity that is actually directly controlling the facility.

In sharpening the *Bestfoods* standard, two additional points are instructive. First, even if the U.S. government does not directly enter into a contract with a facility and instead acts as a regulator over that facility, operator liability can still attach to the government if the regulation is sufficiently intense. In *FMC Corp. v. U.S. Department of Commerce*,[52] the dissent characterized the federal government's activity as purely "regulatory" in part because the government imposed certain regulations on but did not directly purchase from the facility in question—which produced rayon, a rubber substitute.[53] Rather than possessing a direct contract with the U.S. government, the rayon facility first sold its rayon to a separate company (for tire production) before the rayon made its way into the U.S. government's World War II vehicles.[54] Under these facts and in contrast to the dissent, the Third Circuit en banc reasoned that operator liability applies to the government as long as it effectively possesses substantial *actual* control over the facility. The court then held the U.S. liable as an operator because it "determined what product the facility would produce, the level of production, the price of the product, and to whom the product would be sold."[55]

---

48 524 U.S. 51 (1998).
49 *Id.* at 71.
50 *Id.* at 66–67.
51 *Id.* at 67–68; *see also* MPR Props. Co., LLC v. United States, 583 F. Supp. 3d 981, 992, 996 (E.D. Mich. 2021), *appeal docketed*, No. 22-1789 (6th Cir. Sept. 8, 2022).
52 29 F.3d 833 (3d Cir. 1994) (en banc).
53 *See id.* at 854 (Sloviter, C.J., dissenting).
54 *See id.* at 835–36 (majority opinion); *see also id.* at 854 (Sloviter, C.J., dissenting).
55 *Id.* at 843 (majority opinion).

MICHELLE DAVID
633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

Second, the operator standard requires affirmative acts by the PRP. Per the Sixth Circuit in *United States v. Township of Brighton*,[56] an operator must perform specific affirmative acts (rather than merely acts of omission),[57] and neither the plain *ability* to control[58] nor the plain *ability* to regulate[59] a facility will amount to operator liability. In 2020, the Third Circuit in *PPG Industries Inc. v. United States*[60] similarly stated that mere formal or general control over a facility is insufficient to attach operator liability.[61] Instead, relying on *Bestfoods*, the Third Circuit held that operator liability would additionally require "some indicia of control over the facility's polluting activities."[62] The Ninth Circuit[63] and a Michigan district court[64] agree.

In applying these "operator" standards to the Navajo uranium mines, the facts of three cases are most relevant. Each case is explained in turn below, before this Section then turns to comparing their facts to those of the uranium mines at hand. The first helpful case here, already mentioned *supra* in this Section, is *FMC*. Prior to World War II, the United States sourced 90% of its crude rubber supply from Asia, but this supply suddenly vanished following Pearl Harbor because most of this rubber was imported from Japanese-occupied territory.[65] In response, President Franklin D. Roosevelt empowered the War Production Board to "issue directives to industry" that dictated and expedited the production process for wartime goods such as rayon.[66] In light of this extensive power, *FMC* held the government liable as an operator of the rayon facility at issue in the case. The court reasoned that, because the government mandated rayon production, controlled the distribution of raw materials, and was the end user of almost all rayon, it essentially set the operating level and profit of each rayon company.[67] Moreover, the *FMC* court found that the federal government was directly tied to the hazardous waste generated. Because the waste was highly visible and inherent to the

56 153 F.3d 307 (6th Cir. 1998).
57 *Id.* at 315.
58 *Id.* at 314 (finding the "actual control" standard instructive, as opposed to the "ability to control" or "authority to control" standards).
59 *Id.* at 316; *see also* United States v. Sterling Centrecorp Inc., 977 F.3d 750, 758–59 (9th Cir. 2020) (finding the operator standard unmet because the government possessed only "general" wartime "regulatory authority" and had merely instructed the gold mine at issue to shut down).
60 957 F.3d 395 (3d Cir. 2020).
61 *Id.* at 403.
62 *Id.*
63 The Ninth Circuit held that operator liability requires "actual participation in decisions related to pollution." *Centrecorp*, 977 F.3d at 758.
64 In *MRP Properties Co. v. United States*, a Michigan district court stated: "*Bestfoods* 'sharpen[ed]' the definition of an 'operator' for CERCLA purposes by broadening the 'actual control' inquiry to include control over 'operations *having to do with* leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.'" 583 F. Supp. 3d 981, 995–96 (E.D. Mich. 2021).
65 *FMC*, 29 F.3d at 836.
66 *Id.*
67 *Id.* at 837.

MICHELLE DAVID
633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

rayon production process, the federal government had knowledge of the vast amounts of hazardous waste generated.[68] Despite this knowledge, the government continued to "pressure" facilities to maximize production levels—levels that necessarily increased the amount of material disposed.[69] Lastly, the court found that the government increased hazardous waste by rejecting materials that did not adhere to stringent production specifications and by generating waste directly from its government-owned equipment.[70]

A second helpful case is *MRP Properties Co. v. United States*.[71] During World War II, the federal government created the Petroleum Administration for War (PAW), a national oil agency that "exercised significant control over"[72] the "prices, profits, and allocation of petroleum products and the raw materials needed to create them."[73] PAW was subdivided into regional districts—each of which "supervised, among other things, the production, refining, supply, transportation, distribution, and marketing of petroleum products."[74] Moreover, PAW planned oil production up to a year in advance—tracking production on a per-refinery basis and allocating monthly quantities to refineries[75]—and it reserved "final approval" over all oil production.[76] The relevant issue in *MRP Properties* was whether the United States was liable as an "operator" under CERCLA for its involvement in the domestic oil industry during World War II.[77] The court concluded on summary judgment that the federal government, through PAW, exercised sufficient control over twelve refineries such that the United States was liable as an operator under CERCLA.[78] In addition to pointing to PAW's control over the prices, profits, quantities, and raw materials necessary for oil production, the *MRP Properties* court was persuaded that the World War II defense market for oil was a monopsony,[79] a type of market where there is only one buyer. Because the U.S. government's monopsony created an unequal distribution of power between the U.S. government and the facility—where the facility

68 *Id.* at 837–38.
69 *Id.* at 838.
70 *FMC*, 29 F.3d at 838.
71 583 F. Supp. 3d 981 (E.D. Mich. 2021).
72 *Id.* at 987 (quoting *Shell Oil*, 294 F.3d at 1049).
73 *Id.*
74 *Id.* at 988.
75 *Id.*
76 *MRP Props.*, 583 F. Supp. 3d, at 988.
77 *Id.* at 991.
78 *Id.* at 998.
79 *Id.* at 999.

MICHELLE DAVID
633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

was essentially at the will and whim of the government—the court concluded that the facility did not truly operate voluntarily or independently of the government.[80]

The third relevant case is *Exxon Mobil Corp. v. United States*,[81] in which a Texas district court held the U.S. government liable as an operator of two chemical plants[82] but declined to hold it liable as an operator for two oil refineries.[83] For the chemical plants, the *Exxon* court found that the government approved plant designs and required governmental approval for waste disposal plans, expenditures above $1,000, plant alterations, and employee salary and benefits.[84] The court also concluded that the government "knew" the facility was disposing of spent waste in open basins, and it delayed improvements in waste-processing at the plants in order to maximize production.[85] Knowledge of the increased waste along with the government's significant management of the facility justified operator liability.

In contrast to its conclusions regarding the chemical plants, the *Exxon* court found that the government's role regarding the oil refineries was more akin to that of a "very interested consumer" involved in voluntary, consensual—not coercive—contracts.[86] For the refineries at issue, the court found that the parties neither negotiated nor specified via contract the disposal activities,[87] and the government did not design, specify, or provide any of the refinery equipment.[88] The court further held that the government's general wartime "'authority to control'" private entities was not itself sufficient to confer PRP status because a "direct nexus" to decisions over waste disposal was necessary.[89]

b) Applying the law to Navajo uranium mines that were active between 1948 and 1970. The federal government's control over uranium mines on the Navajo Nation between 1948 and 1970 rises to the level of operator liability and closely follows the facts of the *FMC* rayon facility, *MRP Properties*' oil refineries,

---

80 *Id.*
81 108 F. Supp 3d 486 (S.D. Tex. 2015).
82 *Id.* at 531–32.
83 *Id.* at 529, 532.
84 *Id.* at 531.
85 *Id.*
86 *Exxon*, 108 F. Supp. 3d at 523 (quotation marks omitted). An Idaho district court similarly held that the U.S. government was not an "operator" in its involvement in metal mining activities because the "mines and mills were not forced to produce" and instead simply "elected" to do so. Coeur D'Alene Tribe v. Asarco Inc., 280 F. Supp. 2d 1094, 1129 (D. Idaho 2003).
87 *Exxon*, 108 F. Supp. 3d at 525.
88 *Id.* at 526.
89 *Id.* at 524.

MICHELLE DAVID
633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

and *Exxon* chemical plants. The federal government not only founded the U.S. uranium market but also drove and controlled it over several decades, particularly during the period between 1948 and 1970.[90] The Section proceeds by first discussing generally the AEC's control over the domestic uranium industry between 1948 and 1970, when most uranium mines on Navajo lands operated.[91] It then discusses circumstances specific to the Navajo that reinforce the U.S. government's liability for these mines. On the Navajo Nation, in particular, the U.S. government wielded extraordinary influence in setting the terms of mining contracts without meaningful consultation with the Navajo.

From 1948 to 1970, the federal government had a complete stranglehold on the domestic uranium market—one akin to, if not exceeding, the likes of *FMC*, *MRP Properties*, and *Exxon*. Key to the U.S. government's operator liability is that it directly managed mining operations on Navajo lands in order to achieve breakneck-speed production, leading to anticipated and known increases in waste and disregard for the consequences of poor waste disposal. The U.S. government achieved this level of control in two ways: (1) generally, it dictated the exploration of raw ore, set the price of the ore, and decreed itself the sole buyer of enriched uranium in the end use–market; and (2) specifically, it circumvented and displaced meaningful Navajo management of mining operations through hands-on negotiation and approval of mining contracts.

First, like in *MRP Properties* and *FMC*, the U.S. government established the "prices, profits, and allocation[s]"[92] for uranium mining operations so as to maximize production levels. In *MRP Properties*, PAW managed the raw materials necessary for oil production, set oil prices a year in advance, and maintained a monopsonistic market.[93] In *FMC*, the U.S. government similarly controlled the distribution of raw materials, set production levels, and was the end user of all rayon.[94] Here, the same is also true: the AEC managed exploration efforts and product requirements, set price guarantees for ore, and decreed itself the sole buyer and end user.

---

90 *See* VOYLES, *supra* note 1, at 62 (2015) ("[T]he search for uranium has been the only government-induced, government-maintained, government-controlled mining boom in the nation's experience.") (quoting Herbert Lang, *Uranium Mining and the AEC: The Birth Pangs of a New Industry*, 36 BUS. HIST. REV. 325, 325 (1962)).

91 Brugge & Goble, *supra* note 19, at 28.

92 *MRP Props.*, 583 F. Supp. 3d at 987.

93 *Id.* at 987–88, 999.

94 *FMC*, 29 F.3d at 843.

MICHELLE DAVID
633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

With respect to exploration and product requirements, the AEC tightly monitored the search for high-quality uranium ore. In 1948, the AEC, in coordination with the science- and resource-focused U.S. Geological Survey (USGS) launched a large-scale exploratory effort to identify uranium deposits on U.S. public lands, including airborne surveys and on-site drill tests.[95] If uranium was discovered, the AEC then leased the land to companies to mine.[96]

With respect to price controls, the AEC developed three- and ten-year price guarantees beginning in 1948 for the delivery of uranium ore to U.S. purchasing stations, along with bonuses for especially high-grade ore.[97] These newly constructed AEC purchasing stations were scattered throughout the West, and, at these sites, U.S. government contractors would weigh, inspect, and purchase the ore at the predetermined prices.[98] Moreover, the AEC even provided "haulage allowance[s]" to compensate mining companies for delivering the ore to these purchasing stations.[99] Through these on-the-ground purchasing stations, the AEC could tightly oversee and track production on a regional and per-mine basis. While the AEC adjusted its pricing schemes over time,[100] they remained a key fixture in the uranium industry through the end of the 1960s, fueling the United States' nuclear ambitions throughout much of the Cold War.[101] This national procurement program jolted the uranium industry into production and spurred a new generation of uranium explorers hoping to strike it rich.[102]

Lastly, with respect to maintaining a monopsony, the AEA installed the United States as the "sole legal buyer, refiner, and producer of uranium ore for atomic energy use" from the get-go.[103] As a result, private companies could legally sell uranium ore only to the federal government for further enrichment and use. The AEC did not begin breaking down this total monopsony until 1958, when it announced that AEC-licensed private companies could also purchase domestic yellowcake—enriched ore, as opposed to raw ore

95 MICHAEL A. AMUNDSON, YELLOWCAKE TOWNS: URANIUM MINING COMMUNITIES IN THE AMERICAN WEST 22 (2002).
96 *Id.* at 22.
97 *Id.*
98 *Id.* at 22. The government also financed new roads and airports to increase uranium accessibility. VOYLES, *supra* note 1, at 104–05.
99 CHARLES RIVER ASSOCS. INC., URANIUM PRICE FORMATION 3-13 (1977).
100 In 1962, the federal government ended its price guarantees for ore, but it replaced the ore price guarantees with mill price guarantees. *Id.* at 3-15. These mill guarantees still dictated ore rates, though less directly. *See id.* at 3-15 n.5 ("The AEC nonetheless controlled ore prices to some extent through the mill contracts. If ore prices were out of line, the AEC could exert pressure to correct this before signing the mill contract.").
101 *See* AMUNDSON, *supra* note 95, at 30–31.
102 *Id.* at 26 (recounting popular stories from the time that described "rags-to-riches" Americans, who were dubbed "'uraniumaires'").
103 *Id.* at 20; VOYLES, *supra* note 1, at 119.

MICHELLE DAVID
633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

from mines—in order to develop a commercial nuclear energy industry.[104] No matter the buyer, however, the U.S. government maintained a monopoly on all domestic enrichment services for every uranium end use, meaning private companies were required to contract with the government for all enrichment services.[105] In other words, even though private companies could now buy yellowcake for commercial purposes, the yellowcake only reached their hands after the U.S. government first purchased the ore from uranium mines and then enriched it into yellowcake itself.[106] While the AEC began allowing private companies to purchase uranium ore directly from mines and mills in 1964,[107] the U.S. government remained the sole end user of ore from many companies through 1970.[108]

Beyond the U.S. government's general controls over mining, the government directly managed and oversaw mining contracts, and this was nowhere clearer than in the case of mining contracts on Navajo lands. When the AEC hoped to establish mining on tribal lands, it worked with the Bureau of Indian Affairs (BIA) to negotiate the contracts with private entities, then presented the contract to the Navajo Tribal Council for official approval.[109] Although the AEC advised the public that formal approval from the Navajo Tribal Council was required before exploration or mining activities could occur on Navajo lands—in accordance with the 1938 Tribal Mineral Leasing Act[110]—this approval was commonly disregarded or treated as mere formality.[111] The AEC or BIA often presented pre-negotiated mining contracts to the Navajo Tribal Council as economic development initiatives requiring only a final seal of approval.[112]

Before these contracts would have reached the tribal approval phase, the AEC would have already set the ore, milling, and haulage costs in the contracts and established production quotas.[113] Moreover, the AEC

---

104 AMUNDSON, *supra* note 95, at 109.
105 *Id.*
106 *Id.*
107 *See* Private Ownership of Special Nuclear Materials Act of 1964, Pub. L. No. 88-489, 78 Stat. 602 (1964) (codified in scattered sections of 42 U.S.C.).
108 AMUNDSON, *supra* note 95, at 20, 23, 109; *see also* CHARLES RIVER ASSOCS., *supra* note 99, at 3-20 ("The AEC remained the only legal purchaser of [enriched uranium] until 1966, and commercial purchases for current delivery after 1966 were initially very small. AEC procurement ended entirely in 1970."). By the late 1960s, the uranium industry was faltering. AMUNDSON, *supra* note 95, at 106–07. As a result, the government allowed companies to defer their contracts—initially set to expire by 1966—through 1968 until the commercial industry could take off. *Id.* at 108. Through its "stretch-out" program, the United States promised to purchase uranium from deferring companies through 1970. *Id.*
109 Johnston et al., *supra* note 7, at 117.
110 Pub. L. No. 75-506, 52 Stat. 346 (1938); *see also* VOYLES, *supra* note 1, at 77.
111 VOYLES, *supra* note 1, at 64. Prospectors were unlikely to know how to seek tribal approval or if they were even on tribal lands. *Id.* at 66.
112 Johnston et al., *supra* note 7, at 117; VOYLES, *supra* note 1, at 81.
113 AMUNDSON, *supra* note 95, at 29; *see also* Testimony of Defendants' Expert Witness, Dr. Jay Brigham, El Paso Nat. Gas Co. v. United States, 3:14-cv-08165, Dkt. No. 196, at *30 (D. Ariz. Mar. 1, 2019) [hereinafter Brigham Testimony]:

MICHELLE DAVID
633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

would only approve contracts once prospective companies had submitted proposals demonstrating their ability to meet strict AEC requirements regarding "ore supply, technical capability, and financial responsibility."[114] Once a company had met all of the requirements, however, the federal government intentionally made the path to profit easy for these companies, which received large benefits and allowances.[115] These contracts "open[ed] [Navajo lands] up to prospectors, miners, and, eventually, mills for processing the ore and mill tailings piles for dumping the inevitable waste."[116]

Importantly, while the Navajo did seek out and approve mining contracts in the hopes of spurring economic growth, the U.S. government manipulated the process. These contracts were designed to maximize production and consequently "degraded" rather than improved the Navajos' ability to benefit economically as a tribe."[117] And, once the leases were executed, the Navajo could not terminate them without approval from the U.S. Department of the Interior.[118] This one-way ratchet was especially problematic given the latent nature of radiation exposure, the effects of which could take years to appear.[119]

Furthermore, the balance of power between the AEC and Navajo was asymmetric, with the AEC wielding significant coercive power over the Navajo Nation, which was designated as a reservation and forced by the federal government into some degree of dependence.[120] One example of this dependence played out in the financing of roads on Navajo lands. In seeking funding for road construction throughout its lands, the Navajo found that the federal government was all too "eager[ ]" to build roads where the need from industry was great but not otherwise—in fact, the government was actively reluctant to build roads on Navajo lands if it was not connected to industry.[121] Professor Traci Voyles further characterizes the mining and milling labor that the Navajo supplied as a "forced choice" in many ways.[122] She explains that, given

---

> Q[uestion:] . . . [T]he Navajo Nation was not involved in any of that [exploration or purchasing] activity, whether it be pricing of the uranium, . . . milling the uranium, any of the processes and procedures . . . ? A[nswer:] No. It just set what they wanted as a royalty rate.

114 AMUNDSON, *supra* note 95, at 29.

115 *See id.* (describing these contracts as "favorable" to the companies).

116 VOYLES, *supra* note 1, at 83–84.

117 VOYLES, *supra* note 1, at 83–85 (explaining, for example, that the AEC commonly negotiated contract terms that provided the "lowest possible cost" to industry and lowest royalty amounts to the Navajo, all of which the AEC framed as a benefit to the Navajo).

118 Brigham Testimony, *supra* note 113, at *49.

119 Dawson & Madsen, *supra* note 15, at 128 (reporting latency periods of between nineteen and twenty-five years).

120 VOYLES, *supra* note 1, at 84, 114–15; *see also* EICHSTAEDT, *supra* note 24, at 37–38 (explaining that the Navajo leadership understood the uranium activities to be economically beneficial at the time, but this understanding was without the wider context of the associated health risks).

121 See VOYLES, *supra* note 1, at 105–06.

122 *Id.* at 114–15.

MICHELLE DAVID
633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

the federal government's insistence on uranium expansion and the limited nature of other job opportunities on Navajo lands, many Navajo workers were essentially coerced by the AEC and BIA into working in uranium mines and mills when no other opportunities were available.[123] Speaking of the economic pressure, Navajo miner Tommy James said, "[T]o say I wish I did not work is impossible . . . it is money that is used to get what is needed, such as food and clothing. Because of these needs, even though it may be dangerous, you will go there to work. That is how it is."[124] The AEC itself even recognized this power imbalance in a 1951 statement regarding tribal lands when it confirmed, "We have, undoubtedly, had some influence on the establishment of regulations and procedures for the operation of uranium mineral lands."[125]

In a sense then, here, the narrative spun by the *Exxon* court regarding the oil refineries—that the federal government was merely a "very interested customer" engaging in contracts that lacked an element of coercion[126]—seems less apt. Instead, it seems more plausible that the government certainly imposed a level of coercion on the Navajo and uranium mining contracts, or at least the government did not enter into contracts that were completely "voluntary" and "consensual" as the *Exxon* court found.[127]

Taken together, the U.S. government's general profit-setting control over the uranium market and its specific coercive management over Navajo contracts suggest that the U.S. government almost certainly satisfies the operator standard with regard to uranium mining between 1948 and 1970. The government's maximum-production campaign on both fronts clearly would have led to foreseeable increases in hazardous waste at mining facilities—which the government knew contaminated people and lands, as discussed in Part I *supra*. As a result, even if a court disagrees that the U.S. government is liable as an owner, the facts supporting operator liability are quite strong and support an independent finding of liability.

III. PRACTICAL CONSIDERATIONS [OMITTED]

CONCLUSION [OMITTED]

---

[123] *Id.*

[124] Phil Harrison, *"It Was Like Slave Work": Oral History of Minor Tommy James*, *in* THE NAVAJO PEOPLE AND URANIUM MINING 117, 123–25 (Doug Brugge, Timothy Benally & Esther Yazzie-Lewis eds., Esther Yazzie-Lewis & Timothy Benally trans., 2006).

[125] VOYLES, *supra* note 1, at 84 (quoting Frank MacPherson, *Relations Between the Navajo Indian Tribe-Area Office of the Navajo Indian Reservation, and the U.S. Atomic Energy Commission*, NARMR 434-99-208, "Program Correspondence," Box 3 (Nov. 13, 1951)).

[126] *Exxon*, 108 F. Supp. 3d at 523.

[127] *Id.*

Applicant Details

First Name	**Nathaniel**
Last Name	**Drum**
Citizenship Status	**U. S. Citizen**
Email Address	**drumnc21@wfu.edu**
Address	**Address** Street **525 Crowne Oaks Circle** City **Winston-Salem** State/Territory **North Carolina** Zip **27106** Country **United States**
Contact Phone Number	**(828) 234-4485**

Applicant Education

BA/BS From	**University of North Carolina-Chapel Hill**
Date of BA/BS	**May 2018**
JD/LLB From	**Wake Forest University School of Law** **http://www.law.wfu.edu**
Date of JD/LLB	**May 13, 2024**
Class Rank	**10%**
Law Review/Journal	**Yes**
Journal(s)	**Wake Forest Law Review** **Wake Forest Journal of Business & Intellectual Property**
Moot Court Experience	**Yes**
Moot Court Name(s)	**American Bar Association National Moot Court Team** **Wake Forest Moot Court Board**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

DiMuzio, Ashley
adimuzio@belldavispitt.com
Carlson, Kenneth
kcarlson@constangy.com
3367216843
Davis, Timothy
davistx@wfu.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

WAKE FOREST UNIVERSITY
SCHOOL *of* LAW

Nathaniel C. Drum
525 Crowne Oaks Circle
Winston-Salem, NC 27106
Telephone: (828) 234-4485
Email: drumnc21@wfu.edu

Judge Leslie Gardner
U.S. District Court for the Middle District of Georgia
201 West Broad Avenue
Albany, Georgia 31701

Dear Judge Gardner:

I am writing to express my interest in a term clerkship with your chambers beginning in Fall 2024. I am currently a third-year student at Wake Forest University School of Law, where I have had the pleasure to serve as the Captain of the National Trial Team, a member of the American Bar Association National Moot Court Team, and a staff editor for the *Wake Forest Law Review*, the *Wake Forest Journal of Business & Intellectual Property*, and the symposium edition of the *Harvard Journal of Law & Policy*.

As an aspiring litigator, I am particularly interested in a clerkship with your chambers due to the wide variety of cases and issues that come before your Court. Further, as a native of the Carolinas, with a strong network of friends and family throughout North Carolina and South Carolina, I hope to begin building connections in the Albany legal community. With my long-term goal of building a litigation practice in Albany, the opportunity to serve as a clerk for the U.S. District Court for the Middle District of Georgia through your chambers would be an invaluable experience.

Enclosed are my resume, transcripts, and a writing sample. The writing sample is a simulated memorandum order and opinion written during my elective Writing for Judicial Chambers course denying a litigant's motion to transfer venue. Also enclosed, please find letters of recommendation from the following individuals:

Timothy Davis
Wake Forest School of Law
1834 Wake Forest Rd.
Winston-Salem, NC 27106
davistx@wfu.edu
(336) 758-3670

Kenneth Carlson, Jr.
Constangy, Brooks, Smith & Prophete
One West 4th St.; Suite 850
Winston-Salem, NC 27101
kcarlson@constangy.com
(336) 721-6843

Ashley DiMuzio
Bell, Davis & Pitt
101 N. Cherry St.; Suite 600
Winston-Salem, NC 27101
adimuzio@belldavispitt.com
(336) 722-3700

I am happy to provide a list of independent references, as well as any other information or documentation that would be helpful to you. Thank you for your time and consideration, and I would welcome the opportunity to discuss this matter further.

Sincerely,

Nathaniel C. Drum

Enclosures

Nathaniel C. Drum

525 Crowne Oaks Circle, Winston-Salem, NC 27106 || (828) 234-4485 || drumnc21@wfu.edu

Education

Wake Forest University School of Law — Winston-Salem, NC
Candidate for Juris Doctor, May 2024 — GPA: 3.75 (Top 8%)

Honors and Awards:

- Pro Bono Honor Society
- Cynthia J. Zeliff Mock Trial Competition Semi-Finalist
- 1L Trial Competition Honorable Mention
- Edwin M. Stanley Moot Court Competition Top 16 Finalist
- Dean Suzanne Reynolds Award for highest grade in Legal Research II; Pre-Trial Practice & Procedure; and Trade Secrets & Unfair Competition

University of North Carolina at Charlotte — Charlotte, NC
Paralegal Certificate, December 2018

University of North Carolina at Chapel Hill — Chapel Hill, NC
Bachelor of Arts in Political Science, May 2018
Second Major in Peace, War, and Defense; Minor in History

Law School Leadership & Activities

- National Mock Trial Team Captain
- *Wake Forest Law Review*: Staff Editor
- *Wake Forest Journal of Business & Intellectual Property*: Staff Editor
- *Harvard Journal of Law & Policy*: Symposium Edition Staff Editor
- Student Trial Bar: 1L Mock Trial Competition Co-Chair
- American Bar Association Moot Court Competition Team Member
- Teaching Assistant for Contracts I
- Pro Bono Project: Expungements Clinic Coordinator
- Federalist Society: Vice President for Speakers; 1L Class Representative
- First Generation Law Society: Mentorship Committee Co-Chair

Experience

Restoring Integrity & Trust in Elections — Washington, D.C.
Summer Law Clerk — June 2023 - July 2023

- Conducted a legal research and a historical analysis of voting rights laws during the ratification of the Constitution, during the ratification of the Fourteenth Amendment, and during the ratification of each suffrage amendment in order to identify areas for potential future litigation
- Drafted, critiqued, summarized, and edited court filings including Motions to Intervene, Motions to Dismiss, and Motions for Summary Judgment in ongoing election law litigation cases

Honorable Hunter Murphy, North Carolina Court of Appeals — Raleigh, NC
Judicial Intern — July 2022 - December 2022

- Drafted bench memoranda, court orders, and judicial opinions for complex criminal and civil cases
- Reviewed and analyzed appellate briefs and conducted legal research in order to prepare Judge Murphy for oral arguments and case conferences

Truist Financial — Winston-Salem, NC
Legal Intern — June 2022 - July 2022

- Conducted legal research and drafted memoranda regarding liability for electronic service outages
- Compiled and analyzed new and amended state statutes regulating the collection, storage, use, and distribution of consumer data and private information

Moore & Van Allen — Charlotte, NC
1L Summer Associate — May 2022 - June 2022

- Conducted research and drafted memoranda regarding various issues including contract interpretation, property rights, and evidentiary standards
- Accompanied attorneys and created summary reports regarding civil motions hearings, depositions, and bankruptcy court proceedings

James, McElroy & Diehl Charlotte, NC
Family Law Paralegal December 2020 - July 2021

- Wrote, reviewed, and edited complaints, answers, and motions relating to all family court matters including child support, child custody, spousal support, and equitable distribution
- Collaborated with attorneys to prepare for trials and motion hearings by writing issue synopses, creating evidence binders, and researching relevant case law and statutes

North Carolina Department of Public Safety Gastonia, NC
Probation and Parole Officer April 2020 - December 2020

- Appeared in court and presented case details to the court including steps taken to engage defendants in community activities and the impact of those initiatives on defendants' conduct
- Reviewed case files and met with defendants to make connections with city, county, and state resources and address identified criminogenic needs to reduce the risk of recidivism

North Carolina Department of Public Safety Newton, NC
Judicial Services Coordinator July 2019 - April 2020

- Interviewed and elicited information from convicted offenders regarding their contact information, demographics, employment, education, and criminal background
- Analyzed information and made community service work-site placement decisions based on various factors, including the defendants' availability, criminal background, work history, and skill set

Publications

Copyrighting the Courthouse: The Rise of Copyright Claims on Live Broadcasts of Public Trials, Wake Forest J. Bus. & Intell. Prop. L. Blog, http://ipjournal.law.wfu.edu/blog/. *Publication Forthcoming'*

Community Involvement

The Fund for American Studies Summer Law Fellow
North Carolina Summer Appellate Seminar Participant
North Carolina Advocates for Justice & North Carolina Bar Foundation Mock Trial Competition Volunteer
MockOn High School Mock Trial Competition Volunteer Judge
Elon University Carolina Classic Mock Trial Competition Volunteer Judge
Charlotte Curling Association Volunteer Curling Instructor

Student Name: **Nathaniel Corey Drum**

ID: 06423745 Birthdate: 03/07 Entry Date: Aug 16, 2021

Majors: Law Certificates and Foreign Area Studies

Minors:

Office of the University Registrar
P.O. Box 7207
Winston Salem NC 27109-7207

School of Law

Issued To:

Nathaniel Drum
Parchment:TWB7DZ6K

Date Printed: 09-JUN-2023 Page: 1

Course Level: Law

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
INSTITUTION CREDIT:						
Fall 2021						
LAW	101	Contracts I	3.00	A	12.000	
LAW	103	Criminal Law	3.00	A-	11.010	
LAW	104	Civil Procedure I	3.00	A-	11.010	
LAW	108	Torts	4.00	A-	14.680	
LAW	110	Legl Analysis, Writing & Res I	2.00	B+	6.660	
LAW	112	LAWR I (Research)	0.50	A-	1.835	
LAW	122	Professional Development	0.00	S	0.000	
Ehrs: 15.50 GPA-Hrs: 15.50 QPts: 57.195 GPA: 3.690						
Spring 2022						
LAW	102	Contracts II	3.00	A	12.000	
LAW	105	Civil Procedure II	3.00	A-	11.010	
LAW	111	Property	4.00	B+	13.320	
LAW	113	LAWR II (Research)	0.50	A+	2.000	
LAW	119	Legl Analysis, Writng & Res II	2.00	A	8.000	
LAW	120	Constitutional Law I	3.00	A-	11.010	
LAW	122	Professional Development	1.00	A*	0.000	
Ehrs: 16.50 GPA-Hrs: 15.50 QPts: 57.340 GPA: 3.699						
Fall 2022						
LAW	207	Evidence	4.00	A	16.000	
LAW	219	Appellate Advocacy LAWR III	2.00	B+	6.660	
LAW	340	Externship	2.00	H	0.000	
LAW	522	Jrnl of Bus & Intel Prop Law	0.00	P	0.000	
LAW	570	Pre-Trial Practice & Procedure	3.00	A+	12.000	
LAW	610	Trial Practice Lecture	0.00	P	0.000	
LAW	610L	Trial Practice Lab	3.00	H	0.000	
LAW	615	Trial Team	1.00	H	0.000	
Ehrs: 15.00 GPA-Hrs: 9.00 QPts: 34.660 GPA: 3.851						
Spring 2023						
LAW	200	Legislation and Admin Law	3.00	A	12.000	
LAW	305	Professional Responsibility	3.00	A	12.000	
LAW	340	Externship	2.00	W	0.000	
LAW	401	Agency	2.00	A	8.000	
LAW	427	Writing for Judicial Chambers	2.00	B	6.000	
LAW	427L	Leg Analy Writ & Research IV	0.00	P	0.000	
LAW	522	Journal of Business & IP Law	2.00	P	0.000	
LAW	597	Trade Secrets & Unfair Compet	2.00	A+	8.000	
LAW	615	Trial Team: National	1.00	H	0.000	
Ehrs: 15.00 GPA-Hrs: 12.00 QPts: 46.000 GPA: 3.833						

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Fall 2023						
IN PROGRESS WORK						
LAW	479	Creditrs' Rghts & Bnkrptcy(ON)	4.00	IN PROGRESS		
LAW	514	Federal Courts	3.00	IN PROGRESS		
LAW	533	Artificial Intelligence Law	2.00	IN PROGRESS		
LAW	538	Antitrust	2.00	IN PROGRESS		
LAW	576	Complex Civil Litigation	3.00	IN PROGRESS		
LAW	636	Construction Law	2.00	IN PROGRESS		
In Progress Credits 16.00						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	62.00	52.00	195.195	3.753
TOTAL TRANSFER	0.00	0.00	0.000	0.000
OVERALL	62.00	52.00	195.195	3.753

********** END OF TRANSCRIPT **********

WAKE FOREST UNIVERSITY CEEB Code = 5885 FICE Code = 002978 Email: registrar@wfu.edu Website: registrar.wfu.edu Phone: (336) 758-5207 Fax: (336) 758-6056
For questions or further information, contact the Office of the University Registrar at PO Box 7207, Winston-Salem, NC 27109. The Office of the University Registrar issues official transcripts for all Undergraduates and the Graduate, Divinity and Business Schools.

VALUE SYSTEM

From Fall 1975 to Summer 2001, the undergraduate school awarded course credits. Credits may be converted into conventional semester hours by multiplying the assigned credits by 0.9 (i.e., 4 credits= 3.6 semester hours). Students matriculating in the undergraduate schools beginning in Fall 2001 receive semester hours. The Graduate and Divinity Schools award conventional semester hours.

After Fall of 1998, the undergraduate and graduate schools changed to a plus/minus grading scale. At that time, the Graduate School also changed from a 3.00 point scale to a 4.00 point scale. Graduate students who matriculated before Fall 1998 but were still enrolled as of Fall 1998 had all earlier grades converted to the 4.00 point scale.

TRANSFER CREDITS

Transfer credit may be counted toward the graduation requirements, but grades earned in the transfer course are not used in calculating the Wake Forest grade point average. The grades appearing on the Wake Forest transcript are the actual grades earned, but the units shown are only those accepted for transfer by Wake Forest.

Departmental abbreviations are listed in the Bulletins. Some courses transferred from other institutions may have abbreviations not found in the Bulletin.

Repeated courses are flagged I (included in GPA) or E (excluded in GPA). For classes taken and repeated at Wake Forest, only one grade remains in the cumulative grade point average, based on Bulletin regulations.

DEFINITION OF GRADES AND GRADE POINT VALUES

UNDERGRADUATE

Calculated in grade point average:

Grade	Definition	Points
A	Exceptionally high achievement	4.00
A-		3.67
B+		3.33
B	Superior	3.00
B-		2.67
C+		2.33
C	Satisfactory	2.00
C-		1.67
D+		1.33
D		1.00
D-	Passing but unsatisfactory	.67
F	Failure	.00
I	Incomplete	.00
NR	Grade not reported	.00
WF	Withdrawn Failing	.00
F.	Irreplaceable F	.00

Not calculated in grade point average:

EX	Exemption
P	Passing
FPF	Failure in Pass/Fail grade mode
IPF	Incomplete in Pass/Fail grade mode
NRPF	Not reported in Pass/Fail grade mode
AU	Audit
DR	Official drop approved by the Dean
NC	Non-credit non-graded course
WD	Withdrawal from the university
T (grade)	Transfer Credit
TNS	Dual-Enrollment Transfer Credit
W	Course Withdrawal

DIVINITY

Calculated in grade point average:

Grade	Definition	Points
A	Excellent	4.00
A-		3.67
B+		3.33
B	Commendable	3.00
B-		2.67
C+		2.33
C	Satisfactory	2.00
C-		1.67
D	Unsatisfactory	1.00
F	Failure	.00
I	Incomplete	.00
NR	Grade not reported	.00
WF	Withdrawn Failing	.00
F.	Irreplaceable F	.00

Not calculated in grade point average:

P	Passing
FPF	Failure in Pass/Fail mode
IPF	Incomplete in Pass/Fail mode
NRPF	Not reported in Pass/Fail mode
AUD	Audit
DR	Official drop approved by Dean
WD	Withdrawal from the university
WP	Withdrawal Passing

GRADUATE

Starting with the fall 1997 semester, graduate level courses changed from 300, 400, and 500 level courses to the current 600, 700, and 800 level courses.

System Prior to Summer 1998

Calculated in grade point average:

Grade	Points per Hour
A	3.00
B	2.00
C	1.00
F	0.00

Not calculated in grade point average:

Grade	Definition
P	Passing
F	Failure in Pass/Fail mode
NR	Not reported in Satisfactory/Unsatisfactory mode
I	Incomplete in Satisfactory/Unsatisfactory mode
S	Satisfactory
U	Unsatisfactory
AUD	Audit
DRP	Drop approved by the Dean after regular drop period
NC	Non-credit non-grade courses
WP	Withdraw Passing
WF	Withdraw Failing

System after Summer 1998

Calculated in grade point average:

Grade	Definition	Points
A	Excellent	4.00
A-		3.67
B+		3.33
B	Good	3.00
B-		2.67
C+		2.33
C	Low Passing	2.00
F	Failure	.00
I	Incomplete	.00
NR	Grade not reported	.00

Not calculated in grade point average:

ISU	Incomplete in Satisfactory/Unsatisfactory grade mode
P	Passing
FPF	Failure in Pass/Fail grade mode
IPF	Incomplete in Pass/Fail grade mode
NRPF	Not reported in Pass/Fail grade mode
NR	Not reported in Satisfactory/Unsatisfactory mode
S	Satisfactory
U	Unsatisfactory
AU	Audit
DR	Official drop approved by Dean
NC	Non-credit non-grade course
WD	Withdrawal from the University
WF	Withdrawal Failing
WP	Withdrawal Passing

LAW

COURSE NUMBER SYSTEM: Courses numbered 100-199 are required first-year courses. Courses numbered 200-899 are upper-level required and/or elective courses. Accepted transfer credits may be numbered 900-999, unnumbered and indicated as such, or Wake Forest equivalent courses.

Calculated in grade point average:

Grade	
A+	4.00
A	4.00
A-	3.67
B+	3.33
B	3.00
B-	2.67
C+	2.33
C	2.00
C-	1.67
D+	1.33
D	1.00
D-	0.67
F	0.00

Not calculated in grade point average:

H	Honors
P	Pass
LP	Low Pass
FPF	Failure in Pass/Fail grade mode
AU	Audit
I	Incomplete
NC	No Credit
S	Satisfied
TR	Transfer Credit Accepted
W	Withdrew from Course
WD	Withdrew from School

GRADE SUFFIX: V Waived; X Course not calculated in GPA; * Grade not calculated in GPA, credit earned only.

For classes graduating prior to 2019, see: http://registrar.law.wfu.edu/policies/.

BUSINESS (Graduate)

Students who began the program prior to July 2009, are graded on a 9-point grading system. Students admitted after that date are graded on a 4-point grading system.

Calculated in grade point average:

4 Point Grading System:

Grade	Points
A	4.00
A-	3.67
B+	3.33
B	3.00
B-	2.67
C+	2.33
C	2.00
F	.00

Not calculated in grade point average:

I	Incomplete
P	Pass/Fail Course
AU	Audit
WD	Withdrawn from the University
WP	Withdrawn passing from a course
WF	Withdrawn failing from a course
E	Exempt from a course
T	Course transfer
X	Course waived

9 Point Grading System:

Grade	Points
A+	9
A	8
A-	7
B+	6
B	5
B-	4
C+	3
C	2
C-	1

PROFESSIONAL STUDIES

Calculated in grade point average:

Grade	Points
A	4.00
A-	3.67
B+	3.33
B	3.00
B-	2.67
C+	2.33
C	2.00
F	.00

Not calculated in grade point average:

I	Incomplete
WD	Withdrawn
WF	Withdrawn Failing
T	Transfer

To Whom it May Concern –

I've had the pleasure of knowing Nate Drum over the past two years. As a coach of Wake Forest's Law School National Trial Team, I look for students who are ethical, talented, hardworking, and willing to learn. It's easy for me to say that Nate encompasses all of those traits and more.

The first time I saw Nate was when I was judging a 1L trial competition where the students delivered an opening and a closing statement in a criminal case, while competing against another student. As soon as the round was over, I approached Nate with my card and told him that I expected to see him at tryouts – I knew right there that he had a special talent. And over the course of his 2L year he would prove me right. I have been involved in mock trial for 14 years as a competitor and a coach, and I can say with confidence that Nate has some of the most natural talent that I've come across. His ability to dive deep into a case problem, see things from multiple points of view, and have intelligent, comprehensive conversations about complex legal issues is far above any of my other students in his year. So much so that Nate was chosen to be the lead attorney on our A team we sent to competition this past Spring. I am proud to say that when Nate performed in his mock trial rounds, it didn't feel like I was watching a competition, but rather a real case being tried by a fierce advocate. Nate's role required him to learn both the plaintiff and the defense side of the case, and he did so with mastery. To my other students his strong grasp of the problem seemed to come with ease, but I knew the hours of hard work and dedication that he put into that problem, traits which he invokes in all aspects of his academic career, and will continue to invoke as he graduates and goes on to be an excellent advocate.

Nate is always the student who doesn't stop at the question of "how do I do this," but rather always continues to ask "why is this how to do this?" The rules of our competition allow the use of case law, and Nate was always the student to have citations ready when arguing motions in limine or evidentiary objections during practice.

Trial team is a very time-intensive program, and we expect nothing but excellence from our students. For many, this is the only extra-curricular that they partake in due to the already demanding schedule of law school. However, Nate always found time to give back to his community, logging enough pro bono hours to already be inducted into the Pro Bono Society despite having one year of law school left. On top of that, he's involved in a journal, moot court, and several student-lead organizations. He excels in time management, always being on time with excellent work product. Whenever I ask for volunteers to organize team outings, help prepare trial notebooks, or provide assistance to fellow students, Nate is always the first to step forward.

My goal as an educator is always to enhance my student's lives and capabilities so they can go on to be the best version of themselves and make positive change in their community. Nate embodies all of that and more – he achieves the goals he sets his mind on, and always uses his skills and abilities to better those around him. I am very lucky to have him as a student, and I know that anyone who has him as a clerk, intern, or associate will feel the same.

Sincerely,

Ashley DiMuzio

Ashley DiMuzio, Esq.
Associate Attorney, Bell Davis & Pitt, P.A.
Trial Team Coach, Wake Forest Law School

June 19, 2023

The Honorable Leslie Gardner
C.B. King United States Courthouse
201 West Broad Avenue, 3Rd Floor
Albany, GA 31701-2566

Dear Judge Gardner:

I understand that Nathaniel C. Drum is applying for a clerkship position with your Court. Please know that last spring I had the pleasure of having Nate in my trade secrets and unfair competition course at the Wake Forest University School of Law, and that I highly recommend him for the job.

When I teach trade secrets and unfair competition law, I do so as an adjunct professor whose primary vocation is a labor and employment defense attorney. Therefore, I come to the class with a critical eye toward the practical as well as the academic, while holding my students to a high standard of preparation and performance. Nate demonstrated excellent skills in both, as he was always prepared for our weekly class readings, presented thoughtful questions and insights during class discussions, and showed an ability to quickly recognize the key facts and law at issue in a matter. In addition, he not only received the top grade, which is never an easy task given the comprehensiveness of my exams, but frankly had one of the best final exams of any student since I first started teaching the class 20 years ago.

It's also worth noting that I challenge my students with not just reading and understanding case law and statutes, but also with interpreting and applying that law to factual patterns they'll likely encounter during their future legal practice and which demand quick, alternative thinking. Nate was always prepared and contributed in meaningful ways to that discussion, showing an innate ability to assess and analyze situations for advising "clients" with options and recommended approaches. As you can probably imagine, those traits contributed greatly to his performing so well on our class essay and short answer final exam, which combined with his excellent writing abilities, outstanding grades, honors such as being named to the Pro Bono Honor Society and chosen as a staff editor of the Wake Forest Law Review, and numerous meaningful extracurricular activities, should also make him a valuable addition to your Court.

Unrelated to my trade secrets course, let me also say that I had the pleasure of "judging" a practice session for the law school's National Mock Trial Team on which Nate was a captain. During that pre-competition session before a mock jury, Nate demonstrated excellent skills in translating legal concepts into practical understanding, while presenting a cohesive case theme and theory through focused witness examinations, properly admitting and objecting to exhibits and testimony being offered into evidence, and making persuasive oral arguments. All the while navigating multiple procedural and evidentiary issues that could significantly affect trial strategy and what the jury might consider in reaching a verdict, and which could quite frequently be encountered in cases before your Court.

On top of this, Nate is simply a pleasure to be around. He works hard, but even more appears to enjoy the hard work and is quite respectful and friendly in the process. If this is also what you're looking for in a clerk – which, by the way, is always at the top of my list in hiring for our law firm – then I would add that as well to my strong recommendation for offering Nathaniel C. Drum a federal clerkship.

Please let me know if you have any questions concerning this letter, or if you would like to discuss Nate's application any further. With highest regards, I remain

Very truly yours,

Kenneth P. Carlson, Jr.

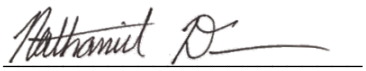
Kenneth Carlson - kcarlson@constangy.com - 3367216843

Writing Sample

Below is an excerpt from a draft memorandum order and opinion which was prepared as part of my elective legal analysis, writing, and research (LAWR IV) class, Writing for Judicial Chambers.

The assignment required that I review a pending Motion to Transfer Venue in the case of *United States v. Oliveras*, 1:21-cr-00738 (D.D.C.) before Judge Beryl A. Howell. I was then provided with a brief, fictitious, email from Judge Howell instructing that I draft a memorandum order and opinion denying the motion.

As part of a written assignment for a course grade, I hereby certify that I received no assistance in drafting the memorandum and that the writing sample below has been unedited by others.



MEMORANDUM ORDER & OPINION

Defendant Michael Oliveras ("Oliveras") is charged with four misdemeanors stemming from his alleged conduct at the U.S. Capitol on January 6, 2021. Specifically, Oliveras is charged with: (1) entering and remaining in a restricted building or grounds in violation of 18 U.S.C. § 1752(a)(1); (2) disorderly and disruptive conduct in a restricted building or grounds in violation of 18 U.S.C. § 1752(a)(2); (3) disorderly conduct in a Capitol Building in violation of 40 U.S.C. § 5104(e)(2)(D); and (4) parading, demonstrating, or picketing in a Capitol Building in violation of 40 U.S.C. § 5104(e)(2)(G). Currently pending before this Court is Defendant's Motion for Transfer of Venue ("Def.'s Mot."), ECF No. 36, filed on November 3, 2022.

Oliveras asserts two bases for his Motion: (1) that pursuant to Fed. R. Crim. P. 21(a), this Court should transfer his case for prejudice; and (2) that pursuant to Fed. R. Crim. P. 21(b), this Court should transfer his case for convenience. *Id.*

As explained below, these arguments are without merit. Therefore, this Court joins every other Judge on this Court to have considered—and consistently rejected—these arguments from defendants charged for their conduct relating to the events of January 6, 2021. Accordingly, the Motion is denied.

I. DISCUSSION

Oliveras first argues that this Court must grant the Motion and transfer his case to the District of New Jersey because community hostility, primarily driven by media coverage of the events of January 6, 2021, has created a presumption of juror prejudice, making it impossible for him to receive a fair and impartial trial in the District of Columbia ("the District"). *Id.* at 1-7. Oliveras then argues that this Court should exercise its discretion and grant the Motion "for convenience." *Id.* at 8-13.

A. Transfer for prejudice, pursuant to Fed. R. Crim. P. 21(a), is unwarranted.

Oliveras argues that community hostility surrounding this case is so severe that this Court should presume juror prejudice, without conducting voir dire, thus requiring that this case be transferred. Specifically, Oliveras argues that the size and characteristics of Washington, D.C., when combined with the ongoing negative media coverage of the events of January 6, 2021, make it impossible for him to receive a fair and impartial trial.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. amend. VI. The right to an impartial jury does not necessitate that "jurors be totally ignorant of the facts and issues involved." *Irwin v. Dowd*, 366 U.S. 717, 722 (1961); *see also Smith v. Phillips*, 455 U.S. 209, 217 (1982) (observing that "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote."). Rather, the Sixth Amendment protects the "right to be tried by jurors who are capable of putting aside their [pre-existing] personal impressions and opinions and rendering a verdict based solely on the evidence presented in court." *United States v. Orenuga*, 430 F.3d 1158, 1162 (D.C. Cir. 2005). Nonetheless, when "the court is satisfied that so great a prejudice against the defendant exists in the [] district that the defendant cannot obtain a fair and impartial trial," the court is compelled to transfer the case to another district. Fed. R. Crim. P. 21(a). Such transfers are a "basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955).

"[A] 'thorough examination of jurors on voir dire' is the most important tool for ensuring that a defendant receives a fair and unbiased jury." *United States v. Garcia*, No. 21-0129 (ABJ), 2022 WL 2904352, at *5 (D.D.C. Jul. 22, 2022) (quoting *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976)). Without conducting a thorough voir dire to determine the "what the prospective juror has read and heard about the case and how his exposure has affected his

attitude towards the trial," *United States v. Haldeman*, 559 F.2d 31, 69 (D.C. Cir. 1976), "a presumption of prejudice . . . attends only the extreme case." *Skilling v. United States*, 56 U.S. 358, 381 (2010). In considering whether to presume prejudice, the Supreme Court in *Skilling* identified three factors for courts to consider: (1) the size and characteristics of the jury pool; (2) the type of information included in the media coverage; and (3) the time period between the arrest and trial, as it relates to the attenuation of the media coverage. *Skilling*, 56 U.S. at 378.

1. The size and characteristics of the District's jury pool do not support a finding of prejudice.

With regard to the first *Skilling* factor, the size and characteristics of the jury pool, Oliveras argues that it weighs in favor of transfer because: (1) a large proportion of the District's jury pool works for the federal government or have close connections to those who do; (2) even those who are unrelated to federal government employees were likely traumatized due to the events of January 6, 2021; and (3) a supermajority of District residents voted for President Joseph Biden during the 2020 election. Def.'s Mot. at 4-7. As explained below, these arguments are without merit.

Oliveras relies extensively on *Rideau v. Louisiana* to support his argument that the size and characteristics of the District support transferring venue. 373 U.S. 723 (1963). However, *Rideau* is clearly distinguishable from the case at bar. In *Rideau*, the defendant was charged with armed robbery, kidnapping, and murder in the Calcasieu Parish of Louisiana. *Id.* at 723-24. After his arrest, a video and audio recording of the defendant's confession was broadcast on local news stations. *Id.* at 724. The recording was played three times over a period of days in which each broadcast was watched by audiences ranging from 24,000 to 53,000 people. *Id*. The parish was only home to a total of 150,000 people. *Id*. Prior to trial, the defendant moved for a transfer of venue based on the widespread broadcast of his recorded confession. *Id.* at 724-25. The Supreme

Court held that the trial court erred and should have granted the defendant's motion to transfer venue. *Id.* at 727. It reasoned that the extreme circumstances of the case, including the large portion of the small parish who had been exposed to the videotaped confession, made it impossible for the defendant to receive a fair trial. *Id.* at 726-27. Specifically, the Court noted that examining the voir dire record was not necessary because the particular characteristics of the small parish and the widely circulated broadcast made it impossible for the defendant to empanel a jury "who had not seen and heard [his] televised [confession]." *Id.* at 727.

As has been recognized by other judges in this District, "Washington is hardly a one-stoplight village, and it is much larger than districts in the handful of cases in which prejudice has been presumed," such as in *Rideau*. *United States v. Ballenger*, No. 21-719 (JEB), 2022 WL 16533872, at *2 (D.D.C. Oct. 28, 2022); *see also Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1044 (1991) (finding prejudice unlikely in a district smaller than this District); *Mu'Min v. Virginia*, 500 U.S. 415, 429 (1991) (refusing to presume prejudice in a district smaller than this District). Rather, "[g]iven [this District's] large, diverse pool of potential jurors, the suggestion that twelve impartial individuals could not be empaneled is hard to sustain." *Skilling*, 561 U.S. at 382.

Oliveras's first contention that "a huge proportion of the District of Columbia residents either work for the federal government themselves or have friends and family who do," while perhaps true, does not warrant a presumption of prejudice. Def.'s Mot. at 4. As the government notes in its opposition, "merely being employed by the federal government" does not inherently render a person incapable of serving as an impartial juror. Gov't's Opp'n Def.'s Mot. Transfer Venue (Gov't's Opp'n), ECF No. 42 at 3. While certainly numerous federal employees, such as the Capitol Police and Congressional staff, were impacted by the events of January 6, 2021, the

overwhelming majority were not. Further, as noted by the government, of the District's over 700,000 residents, more than 550,000 are not employed by the federal government. Gov't's Opp'n at 4. Therefore, even taking Oliveras's argument at face-value, that all federal government employees are irreparably prejudiced against him, the overwhelming majority of District residents do not fall within this category. Simply put, to presume that all federal employees, their friends, families, and neighbors, are incapable of impartiality in this case both wildly overestimates the direct impact of the January 6, 2021 events and underestimates the ability of District residents to serve impartially.

Oliveras's second contention that "even District residents that have no direct connection to the government reported feeling deeply traumatized by the events [of January 6, 2021]," again, while perhaps true, does not warrant a presumption of prejudice. Def.'s Mot. at 5. Oliveras notes that the Mayor's declaration of a state of emergency, implementation of a city-wide curfew, restricted access to public transportation, and advisories not to attend the presidential inauguration, contributes to the District's collective prejudice. *Id.* at 4-5. However, as noted by the Court in *Skilling*, "[a]lthough widespread community impact necessitated careful identification and inspection of prospective jurors' connection" to the subject-matter of the litigation, "voir dire was 'well suited to that task.'" *Skilling*, 561 U.S. at 384. Again, while it may be true that many of the District's residents were, in some small way, impacted by the events of January 6, 2021, such attenuated connections are insufficient to support a presumption of prejudice. Of the 700,000 potential jurors residing in the District, their experiences surrounding the events of January 6, 2021 are unique and varied, and thus, an appropriate subject to inquiry during voir dire.

Oliveras's third contention that "an overwhelming number of District of Columbia residents . . . voted for President Biden" again, while perhaps true, does not warrant a presumption of prejudice. Def.'s Mot. at 7. "A community's voting patterns" are irrelevant to the consideration of a motion to transfer venue. *Haldeman*, 559 F.2d at 277, n. 43. (affirming the denial of a motion to transfer venue from the District of Columbia for a prosecution related to the Watergate political scandal during the Nixon administration when approximately eighty percent of District voters had voted for the Democratic Party's candidate in the prior two elections). As noted by the court in *Haldeman*, any personal opinions, beliefs, or values which are attributable to a political affiliation and which might interfere with the juror's ability to be impartial is a subject to be examined through voir dire. To hold that a membership in a certain political party, or voting for a certain political party's candidates, is worthy of a presumption of prejudice would be dangerous and have far reaching implications. Doing so would effectively require that any democratic voter in a republican district, or republican voter in a democratic district would be entitled to a transfer of venue. This Court declines to take such a radical position.

Having considered and rejected Oliveras's arguments, the first *Skilling* factor does not weigh in favor of transferring venue.

2. The type of information contained in media reports surrounding the events of January 6th do not support a finding of prejudice.

With regard to the second *Skilling* factor, the type of information included in media coverage, Oliveras argues that this factor weighs in favor of transfer because: (1) the language utilized in news coverage has been "especially charged and inflammatory;" (2) many media reports have been factually inaccurate; (3) the media coverage has been so pervasive within the District; and (4) the media has reported on the decisions and comments of judges on this Court. Def.'s Mot. at 10-12. As explained below, these arguments are without merit.

"[C]ourts have declined to transfer venue in some of the most high-profile prosecutions in recent American history." *See In re Tsarnaev*, 780 F.2d 14, 15 (1st Cir. 2015) (declined to transfer venue from the District of Massachusetts for the accused Boston Marathon bomber); *United States v. Yousef*, 327 F.3d 56, 155 (2d Cir. 2003) (declined to transfer venue from the Southern District of New York for an accused accomplice in the 1993 terrorist attack on the World Trade Center); *United States v. Moussaoui*, 43 F. App'x 612, 613 (4th Cir. 2002) (declined to transfer venue from the Eastern District of Virginia for an accused accomplice in the September 11, 2001 terrorist attacks on the Pentagon building). "The mere existence of intense pretrial publicity is not enough to make a trial unfair, nor is the fact that potential jurors have been exposed to this publicity." *United States v. Childress*, 58 F.3d 693, 706 (D.C. Cir. 1995).

Oliveras's first contention that "[t]he language used in media coverage . . . has been especially charged and inflammatory," does not warrant a presumption of prejudice. Def.'s Mot. at 10. As numerous courts have held, news stories that are "pervasive, adverse," *Sklling*, 561 U.S. at 381-84, and "hostile in tone and accusatory in content," *Haldeman*, 559 F.2d at 61, do not compel a presumption of prejudice. Oliveras has failed to identify with particularly any of the "vivid, unforgettable information" that the *Skilling* court considered as "particularly likely to produce prejudice" in the minds of potential jurors. *Skilling*, 561 U.S. at 384. Moreover, Oliveras has failed to identify any media coverage which has mentioned him by name or which has particularly identified and discussed his involvement in the January 6, 2021 events. *See Skilling*, 561 U.S. at 384, n. 17. (holding that "when publicity is about the event, rather than directed at the individual defendants, this may lessen any prejudicial impact.") While it is certainly expected that news coverage of the January 6, 2021 events would be negative, such negativity does not rise to a level which compels a presumption of prejudice.

Oliveras's second contention that "much early reporting has since been shown to be factually inaccurate" does not warrant a presumption of prejudice. Def.'s Mot. at 11. To the extent that the information with which Oliveras is concerned is relevant to the proceeding, such facts will need to be borne out by the jury. However, to the extent that the facts with which Oliveras is concerned are not relevant to the proceeding, such as Officer Brian Sicknick's cause of death, such facts will not be introduced at trial for the jury's consideration. As with many of Oliveras's contentions, to the extent that these reporting inaccuracies would impair an individual juror's ability to remain impartial is a matter to be explored during voir dire.

Oliveras's third contention that the news coverage of the January 6, 2021 events in the District "is so substantial that it would be surprising to identify any potential jurors who have not been exposed to the coverage" does not warrant a presumption of prejudice. Def.'s Mot. at 11-12. As noted above, potential jurors need not be totally ignorant of the facts of a case, they only need to be able to put aside their preexisting perceptions and reach a verdict based upon the evidence alone. Further, much of the January 6, 2021 media coverage has been nationwide in scope and not limited to the District. Oliveras has failed to show how the national coverage of the January 6, 2021 events would have any lesser impact on the residents of the District of New Jersey.

Oliveras's fourth contention that "the media has widely reported comments of U.S. District Court Judges in this District regarding the events of January 6," does not warrant a presumption of prejudice. Def.'s Mot. at 12. However, like media coverage, comments made by political leaders and judges, while perhaps inadvisable, "contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Skilling*, 561 U.S. at 382. To the extent that any potential jurors recall any

comments from Judges on this Court, this can be explored during voir dire to determine any prejudicial impact.

Having considered and rejected Oliveras's arguments, the second *Skilling* factor does not weigh in favor of transferring venue.

3. The relationship between the media coverage and time since Oliveras's arrest and scheduled trial do not support a finding of prejudice.

With regard to the third *Skilling* factor, the time period between the arrest and trial, as it relates to the media coverage, Oliveras argues that this factor weighs in favor of transfer because news coverage has remained high, despite the twenty-two months since the events of January 6, 2021. Def.'s Mot. at 13. As explained below, this argument is without merit.

"[P]retrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial." *Neb. Press Ass'n*, 427 U.S. at 565. Over two years has passed since the events of January 6, 2021. It is true that Congressional hearings, midterm elections, and continued media coverage have kept the topic of January 6, 2021 fresh in the minds of citizens. However, as noted above, such events have been covered nationally, not localized to the District. Rather, Oliveras's own Exhibit support this conclusion by showing that media stories and news outlets have continued to decrease the amount of time and resources dedicated to covering the events of January 6, 2021. As noted by *Skilling*, a reduced "decibel level of media attention" is a factor demonstrating a reduced likelihood of juror prejudice. At most, other judges in this District considering this factor have held it as being in equipoise.

In considering Oliveras's argument, the third *Skilling* factor is in equipoise.

When weighing the three *Skilling* factors, none favor transferring venue to the District of New Jersey. Because Oliveras has failed to demonstrate a presumption of prejudice on the part of potential District jurors, his motion to transfer venue "for prejudice" is denied.

"'[A]dequate voir dire to identify unqualified jurors' is the primary safeguard against jury prejudice." *United States v. Ballenger*, No. 21-719 (JEB), 2022 WL 16533872, at *1 (D.D.C. Oct. 28, 2022) (quoting *Morgan v. Illinois*, 504 U.S. 719, 729 (1992)). Therefore, courts are given "ample discretion in determining how best to conduct [] voir dire," *Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981), including the "mode and manner of [the] proceeding" and "the range of questions to be asked to prospective jurors," *United States v. Robinson*, 475 F.2d 376, 380 (D.C. Cir. 1973). If, as Oliveras suggests, the venire has become so prejudiced against the defendant that "an impartial jury actually cannot be selected, that fact should become evident at the voir dire." *United States v. Haldeman*, 559 F.2d 31, 63 (D.C. Cir. 1976).

At this stage of the proceeding, Oliveras has failed to demonstrate the existence of prejudice which would require transfer under Fed. R. Crim. P. 21(a). However, pursuant to his Sixth Amendment rights, Oliveras will be granted a full and fair opportunity to expose any bias or prejudice on the part of the veniremen through voir dire.

Applicant Details

First Name	**Garett**
Last Name	**Eldred**
Citizenship Status	**U. S. Citizen**
Email Address	**gne5@georgetown.edu**
Address	**Address** Street **2350 Washington Place #518** City **Washington** State/Territory **District of Columbia** Zip **20018** Country **United States**
Contact Phone Number	**6786446717**

Applicant Education

BA/BS From	**Georgia State University**
Date of BA/BS	**May 2024**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 19, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**The Georgetown Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Georgetown Barristers' Council - Trial Advocacy Division**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hopwood, Shon
srh90@georgetown.edu
Roth, Mindy
mindy_roth@cfc.uscourts.gov
202-357-6362
Sunder, Madhavi
ms4402@georgetown.edu
(202) 662-4225
Butler, Paul
paul.butler@law.georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

GARETT ELDRED

2350 Washington Place NE #518, Washington, DC 20018 • 678-644-6717 • gne5@georgetown.edu

June 10, 2023

Dear Judge Leslie Abrams Gardner,

I am a Haitian American and a rising 3L Opportunity Scholar at the Georgetown University Law Center, and I am writing to apply for a Judicial Clerkship in your chambers. I seek the role not only because it will be beneficial for my writing skills and career but also because it will give me the chance to earn a lifelong mentor. I am confident that I would be successful in your chambers due to my passion for the work, my dedication to excellence, and our shared set of interests and values. I have also had the chance to speak with several of your former clerks, including Ryan Ball, Keyawna Griffith, Erin O'Neill, and Justin Van Orsdol. Each of them spoke very highly of you and their clerkship experience. They mentioned the Court's heavy Civil Rights docket and the unique experience of living in Albany, GA, both of which only increased my aspiration to clerk for you. I humbly believe that my experiences, skillset, and character make me an excellent candidate for this role.

Prior to pursuing a future in law, I established my work ethic and learned the value of teamwork as a Division I student-athlete. I would then earn employment as a filing clerk at Nall & Miller, LLP, where I began developing my writing skills through drafting and filing legal documents. The summer before entering law school, I further developed these skills at Greathouse Trial Law, LLC, by gathering precedent relevant to our cases and drafting legal documents.

Since entering law school, I have had several experiences that have equipped me with the requisite knowledge and skills to positively contribute to your chambers. I have gained an understanding of courtroom procedures by serving as a Judicial Extern in the Court of Federal Claims, Office of Special Masters, and through my membership on Georgetown's Trial Advocacy Team, which led me to win Georgetown's annual 100+ participant Greenhalgh Trial Advocacy Competition, amongst other awards. I was also able to garner practical experience as a Summer Associate at two law firms last summer and by working in-house at AT&T as well. Last fall, I further enhanced my research and writing skills by working as a Research Assistant to tenured Professor Madhavi Sunder.

Currently, I am honing my skills as the Senior Development Editor of *The Georgetown Law Journal* and by working as a Summer Associate at two firms again this summer. This fall, I will again serve as an extern in the public sector and as a Research Assistant to Professor Shon Hopwood. I will conclude my law school experience by completing hundreds of pro bono hours as a Student Attorney in Georgetown's Civil Rights Clinic to better serve those in need and further enhance my skills.

Most importantly, I would like to clerk for you because I believe that our similarities are indicative of shared interests and values. As a member of a Divine Nine organization like yourself, I can better appreciate your passion for service and dedication to the principles that make our members stand out as pillars in our communities. Before entering law school, I upheld this commitment by establishing the "It Could Be You Initiative", an initiative created to serve the homeless population in Atlanta, GA, and by serving as the Community Service Chair for the Zeta Mu chapter of Alpha Phi Alpha Fraternity, Inc. Since entering law school, I have further worked to uphold this commitment by serving as the Community Service Chair of Georgetown's Black Law Students Association and by participating in service efforts with Georgetown's Christian Legal Society. I believe shared interests and principles lead to stronger relationships, which is why I am confident that my time in your chambers would be rewarding, productive, and harmonious if given the opportunity.

I hope to work and learn under your tutelage, and I welcome any opportunity to discuss my qualifications in greater detail. I can be reached at (678) 644-6717 or by email at gne5@georgetown.edu. Thank you so much for your consideration.

Best,

Garett Eldred

Garett Eldred

2350 Washington Place NE #518, Washington, DC 20018 • 678-644-6717 • gne5@georgetown.edu

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER — **Washington, D.C.**
Juris Doctor — May 2024
GPA: 3.42

Journal: *The Georgetown Law Journal*, Senior Development Editor Vol. 112

Honors:
Georgetown Greenhalgh Trial Advocacy Competition - First Place
Week One Teaching Fellow - Spring 2023
Greene Broillet & Wheeler National Civil Trial Competition - Honored Advocate
Opportunity Scholar
Kirkland & Ellis Afro Scholar
AT&T Scholar

Activities:
Barristers' Council - Trial Advocacy Division
Black Law Students Association
Christian Legal Society
RISE
Sigma Delta Tau Legal Fraternity, Inc.

GEORGIA STATE UNIVERSITY — **Atlanta, GA**
Bachelor of Science in Education — May 2021
Honors:
4X Dean's List
Division I Football Scholarship Recipient
Hope Scholarship Recipient
Mr. Unstoppable Winner

Activities:
Alpha Phi Alpha Fraternity, Inc.
Division I Student Athlete
NAACP at Georgia State University

EXPERIENCE

CIVIL RIGHTS CLINIC — **Washington, DC**
Student Attorney — January 2024 – May 2024
- Anticipating serving as the lead counsel on complex litigation matters in areas of voting rights, employment discrimination, housing discrimination, police brutality, conditions of carceral confinement, and equal protection in education, among others

GEORGETOWN UNIVERSITY LAW CENTER — **Washington, DC**
Research Assistant to Professor Shon Hopwood — September 2023 – December 2023
- Anticipating conducting research and delivering memorandums in areas of criminal and constitutional law

BALCH & BINGHAM LLP — **Atlanta, GA**
2L Summer Associate — July 2023 – August 2023
- Anticipating working on complex litigation matters in areas of financial service, healthcare, and energy

BAKER & HOSTETLER LLP — **Atlanta, GA**
2L Summer Associate — May 2023 – July 2023
- Created a slide deck presentation to propose improvements to a Major League Baseball team's Fan Guide and Giveaway Policy
- Drafted a memorandum evaluating the enforceability of a proposed resolution between a Section 8 property owner and a city
- Drafted a memorandum evaluating settlement amounts and reasons thereof for cases of inmate death due to deliberate indifference
- Drafted a memorandum evaluating the Plaintiff burden of proof in data breach cases across all twelve federal circuits
- Drafted a memorandum evaluating the enforceability of a liquidated damages provision in a service agreement between a major hospital and insurance provider
- Anticipating working on more complex litigation matters in areas of healthcare and labor and employment

U.S. COURT OF FEDERAL CLAIMS, OFFICE OF SPECIAL MASTERS — **Washington, DC**
Judicial Intern to Special Master Mindy Michaaels Roth — September 2022 – November 2022
- Drafted opinions related to Motions for Attorney's Fees and Costs based on the "reasonable basis for bringing the case" standard
- Drafted memorandums evaluating how cases should be decided in accordance with the standard of the Vaccine program
- Drafted questions to be asked by Special Master Roth to Expert Witnesses during hearings
- Attended a judicial conference hosted by the Court to learn more about effective advocacy and statutory interpretation

GEORGETOWN UNIVERSITY LAW CENTER **Washington, DC**
Research Assistant to Professor Madhavi Sunder September 2022 – December 2022

- Drafted a series of questions to be asked of Counsel for the Respondent in Georgetown's Moot of *Warhol v. Goldsmith*, a pending Supreme Court case pertaining to Copyright law
- Researched and found new Copyright issues to be discussed and debated amongst students in class
- Revised class powerpoints to be more electronically accessible and reflect recent development in Copyright law

BALCH & BINGHAM LLP **Atlanta, GA**
1L Summer Associate July 2022 – August 2022

- Drafted a memorandum evaluating the legality and constitutionality of a proposed statute's no class action clause and exclusive remedy provision
- Drafted a memorandum evaluating the elements and evidentiary burden of a claim for attorney's fees under OCGA § 13–6–11
- Drafted a memorandum evaluating the limits of an agreement's clause limiting damages to only those which are direct, and not consequential, under New Jersey law
- Assisted in the preparation of a pro-bono hearing regarding a temporary restraining order in Cobb County Magistrate Court.
- Drafted a memorandum evaluating the effects of an intervening clause within a consent order, and a revised intervening clause to clarify the agreement under Georgia law
- Drafted a memorandum evaluating how three Georgia statutes interplay with each other to determine the necessities to authenticate medical records and satisfy the "business records exception"
- Drafted a memorandum evaluating the elements and defenses of an inverse condemnation claim under Georgia law
- Drafted a memorandum evaluating the elements and defenses of a spoliation claim under Georgia law
- Drafted a memorandum evaluating the parameters of non-compete/non-solicit provisions within employment contracts, and a provision incorporating those parameters for an employment contract under Georgia law

AT&T **Atlanta, GA**
Summer Law Fellow July 2022

- Drafted a memorandum to resolve an anti-compete matter brought before the Public Utilities Commission of California
- Prepared for depositions of opposing witnesses and client witnesses to resolve labor and employment disputes
- Contributed viable arguments in strategic planning meetings, based on legal research, to resolve labor and employment disputes

KILPATRICK TOWNSEND & STOCKTON LLP **Atlanta, GA**
1L Summer Associate May 2022 – July 2022

- Drafted a memorandum evaluating the reach of a settlement agreement's "in connection with" clause despite a merger clause within the agreement, under Georgia law
- Drafted a memorandum evaluating the enforceability of a joint defense agreement under Tennessee law
- Created a slide deck used for arbitrating a trademark dispute for a Fortune 500 telecommunications holding company
- Drafted notices of opposition and closing letters for trademark disputes for a Fortune 500 sportswear manufacturer and Fortune 500 airline company
- Drafted portions of an agreement to eliminate cellular data within prisons to improve safety measures for a Fortune 500 telecommunications holding company
- Created a case calendar following FRCP and Local Rules for an employment discrimination case between a Fortune 500 telecommunications holding company and one of their former executives
- Volunteered for the firm's Law Camp for the Boys & Girls Club of Metro Atlanta by conducting a presentation on professional attire and coaching the winning team during the camp's Mock Trial Competition

GREATHOUSE TRIAL LAW, LLC **Atlanta, GA**
Litigation Assistant/Summer Intern May 2021 – August 2021

- Filed and sorted through evidence for the firm's most consequential personal injury cases
- Corresponded with clients daily to update them on case proceedings and to request documentation as needed
- Drafted dismissals and other necessary documentation to complete closing procedures
- Assisted in depositions and meetings with opposing counsel to offer support and learn more about the litigation process

NALL & MILLER, LLP **Atlanta, GA**
Filing Clerk December 2020 – April 2021

- Filed documents and corresponded with clients to manage a caseload of thirty matters relating to transportation law
- Drafted Request for Documents Forms to advance the process of discovery
- Independently oversaw the distribution of all mail for the firm's attorneys and staff
- Led in the reorganization of the office's layout and the transition from physical to digital case filing

VOLUNTEER EXPERIENCE

- Alpha Phi Alpha Fraternity, Inc. – Community Service Chairman, Dean of Membership, and Chaplain
- Georgetown Black Law Students Association – Community Service Chairman
- It Could Be You Initiative – President and Founder (An Initiative Established to Serve Atlanta's Homeless Population)
- NAACP at Georgia State University – Health Committee Chairman

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Garett N. Eldred
GUID: 835231260

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	001	94	Civil Procedure Aderson Francois	4.00	B	12.00	
LAWJ	002	41	Contracts Gregory Klass	4.00	B	12.00	
LAWJ	004	42	Constitutional Law I: The Federal System Irving Gornstein	3.00	B	9.00	
LAWJ	005	43	Legal Practice: Writing and Analysis Erin Carroll	2.00	IP	0.00	

	EHrs	QHrs	QPts	GPA
Current	11.00	11.00	33.00	3.00
Cumulative	11.00	11.00	33.00	3.00

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	003	94	Criminal Justice Christy Lopez	4.00	B	12.00	
LAWJ	005	43	Legal Practice: Writing and Analysis Erin Carroll	4.00	B+	13.32	
LAWJ	007	94	Property Madhavi Sunder	4.00	B+	13.32	
LAWJ	008	42	Torts Brishen Rogers	4.00	B+	13.32	
LAWJ	304	50	Legislation Caroline Fredrickson	3.00	B+	9.99	

	EHrs	QHrs	QPts	GPA
Current	19.00	19.00	61.95	3.26
Annual	30.00	30.00	94.95	3.17
Cumulative	30.00	30.00	94.95	3.17

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	110	08	Copyright Law Madhavi Sunder	3.00	A-	11.01	
LAWJ	126	05	Criminal Law Paul Butler	3.00	B+	9.99	
LAWJ	1491	131	~Seminar Deborah Carroll	1.00	A-	3.67	
LAWJ	1491	132	~Fieldwork 2cr Deborah Carroll	2.00	P	0.00	
LAWJ	1491	47	Externship I Seminar (J.D. Externship Program) Deborah Carroll		NG		
LAWJ	1493	05	Prison Law and Policy Shon Hopwood	3.00	A	12.00	
LAWJ	360	05	Legal Research Skills for Practice Rachel Jorgensen	1.00	A	4.00	

In Progress:

	EHrs	QHrs	QPts	GPA
Current	13.00	11.00	40.67	3.70
Cumulative	43.00	41.00	135.62	3.31

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	1196	08	Religion, Morality and Contested Claims for Justice Seminar	2.00	A-	7.34	
LAWJ	1265	05	Advanced Constitutional Law Seminar: The Creation of the Constitution	3.00	B+	9.99	
LAWJ	1335	05	Race, Inequality, and Justice	2.00	A-	7.34	
LAWJ	165	09	Evidence	4.00	A-	14.68	
LAWJ	1650	05	Income and Public Benefits	3.00	A	12.00	
LAWJ	351	02	Trial Practice	2.00	A	8.00	
LAWJ	610	05	Week One Teaching Fellows (Public Speaking For Lawyers)	1.00	P	0.00	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	17.00	16.00	59.35	3.71
Annual	30.00	27.00	100.02	3.70
Cumulative	60.00	57.00	194.97	3.42

End of Juris Doctor Record